

No. 89-1279-CFX
Status: GRANTED

Title: Pacific Mutual Life Insurance Company, Petitioner
v.
Cleopatra Haslip, et al.

Docketed:
February 7, 1990

Court: Supreme Court of Alabama

See also:
89-1607

Counsel for petitioner: Beckman, Bruce A.

Counsel for respondent: Ennis Jr., Bruce J.

40 printed copies mailed 2/7 and recd. 2/8.

Entry	Date	Note	Proceedings and Orders
1	Dec 15 1989	P	Application (A89-452) for a stay pending timely filing and disposition of petition for writ of certiorari, submitted to Justice Kennedy.
2	Dec 20 1989		Response to application (A89-452) filed by respondents.
3	Dec 22 1989		(A89-452) Order by Justice Kennedy granting the stay of execution of judgment of the Supreme Court of Alabama, case No. 87-482, filed September 15, 1989 pending referral of the application to the Court for consideration at the CONFERENCE ON FRIDAY, JANUARY 5, 1990. The order is further conditioned upon the supersedeas bond currently posted with the Circuit Court of Alabama, Jefferson County, Civil Action No. CV 82 2453, remaining in effect.
4	Jan 4 1990		(A89-452) Reply memorandum filed by petitioner.
5	Jan 8 1990		(A89-452) Application for stay granted by Court and the execution and enforcement of the judgment of the Supreme Court of Alabama, case No. 87-482, is stayed pending the timely filing and disposition of a petition for writ of certiorari. This order is further conditioned upon the supersedeas bond presently posted with the Clerk of the Circuit Court of Jefferson County, Alabama, Civil Action No. CV 82 2453, remaining in effect.
6	Feb 7 1990	G	Petition for writ of certiorari filed.
7	Mar 9 1990		Brief amici curiae of American Council of Life Insurance, et al. filed.
8	Mar 9 1990		Brief of respondents Cleopatra Haslip, et al. in opposition filed.
9	Mar 14 1990		DISTRIBUTED. March 30, 1990
10	Mar 26 1990	X	Reply brief of petitioner Pacific Mutual Life Insurance Company filed.
11	Apr 2 1990		Petition GRANTED. *****
13	Apr 25 1990		Order extending time to file brief of petitioner on the merits until June 1, 1990.
14	May 31 1990		Brief amicus curiae of Alabama Defense Lawyers Assn. filed.
15	May 31 1990		Brief amici curiae of Chamber of Commerce of the U.S., et al. filed.
16	May 31 1990		Brief amicus curiae of Defense Research Institute filed.
17	May 31 1990		Brief amicus curiae of The Hospital Authority of Gwinnett County, Georgia filed.
18	May 31 1990		Brief amicus curiae of Mid-America Legal Foundation filed.

Entry	Date	Note	Proceedings and Orders
19	May 31 1990	Brief amicus curiae of City of New York filed.	
23	May 31 1990	Brief amici curiae of Pharmaceutical Manufacturers Assn., et al. filed.	
24	May 31 1990	Brief amicus curiae of National Assn. of Mutual Insurance Companies filed.	
20	Jun 1 1990	Brief amici curiae of Alliance of American Insurers, et al., and attachment filed.	
21	Jun 1 1990	Brief amicus curiae of Center for Claims Resolution filed.	
22	Jun 1 1990	Brief amicus curiae of Equal Employment Advisory Council filed.	
25	Jun 1 1990	Brief amici curiae of Arthur Andersen & Co., et al. filed.	
26	Jun 1 1990	Brief amici curiae of Business Roundtable, et al. filed.	
27	Jun 1 1990	Brief amici curiae of Aetna Life Insurance Co., et al. filed.	
28	Jun 1 1990	Brief amici curiae of American Institute of Architects, et al. filed.	
29	Jun 1 1990	Brief amici curiae of CBS Inc., et al. filed.	
30	Jun 1 1990	Brief amicus curiae of Liability Insurance Writers filed.	
31	Jun 1 1990	Brief amicus curiae of Church of Scientology of California filed.	
32	Jun 1 1990	Brief amicus curiae of Association for California Tort Reform filed.	
33	Jun 1 1990	Brief amicus curiae of National Council of Churches of Christ in the U.S.A., et al. filed.	
34	Jun 1 1990	Brief amici curiae of Bethlehem Steel Corporation, et al. filed.	
35	Jun 1 1990	Brief amicus curiae of Southeastern Legal Foundation, Inc. filed.	
36	Jun 1 1990	Brief amicus curiae of Washington Legal Foundation, et al. filed.	
37	Jun 1 1990	Joint appendix filed.	
38	Jun 1 1990	Brief of petitioner Pacific Mutual Life Insurance Company filed.	
39	Jun 1 1990	Brief amici curiae of National Assn. of Wholesaler-Distributors, et al. filed.	
41	Jun 18 1990	Order extending time to file brief of respondent on the merits until July 16, 1990.	
42	Jul 13 1990	Brief amicus curiae of Trial Lawyers for Public Justice filed.	
43	Jul 13 1990	Brief amicus curiae of California Trial Lawyers Assn. filed.	
44	Jul 16 1990	Brief amicus curiae of Consumers Union of U.S. filed.	
45	Jul 16 1990	Brief amici curiae of Alabama, et al. filed.	
46	Jul 16 1990	Brief amicus curiae of National Insurance Consumer Organization filed.	
47	Jul 16 1990	Brief amicus curiae of Assn. of Trial Lawyers of America filed.	
48	Jul 16 1990	Brief of respondents Cleopatra Haslip, et al. in opposition filed.	
50	Jul 16 1990	Brief amicus curiae of Alabama Trial Lawyers Assn. filed.	
49	Jul 17 1990	Lodging received. 40 copies, box.	
51	Jul 23 1990	SET FOR ARGUMENT WEDNESDAY, OCTOBER 3, 1990. (1ST CASE)	

Entry	Date	Note	Proceedings and Orders
52	Jul 26 1990	CIRCULATED.	
53	Aug 16 1990	X Reply brief of petitioner Pacific Mutual Life Insurance Company filed.	
54	Aug 21 1990	Five volumes of transcrip from Civil Division of Jefferson City Circuit Court, B'ham., Ala., not certified received.	
55	Aug 24 1990	Record filed.	
		* Certified original record received.	
56	Oct 3 1990	ARGUED.	
57	Oct 3 1990	Both parties in this case are to file memorandums after argument.	

89-1279
No.

Supreme Court, U.S.

FILED

FEB 7 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HALGROVE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

VICKI W.W. LAI

ADAMS DUQUE & HAZELTINE

523 West Sixth Street

Los Angeles, California 90014

(213) 620-1240

BRUCE A. BECKMAN

Counsel of Record

ADAMS DUQUE & HAZELTINE

523 West Sixth Street

Los Angeles, California 90014

(213) 620-1240

OLLIE L. BLAN, Jr.

BERT S. NETTLES

SPAIN, GILLON, GROOMS,

BLAN & NETTLES

2117 Second Avenue North

Birmingham, Alabama 35203

(205) 328-4100

J. MARK HART

SPAIN, GILLON, GROOMS,

BLAN & NETTLES

2117 Second Avenue North

Birmingham, Alabama 35203

(205) 328-4100

Attorneys for Petitioner
Pacific Mutual Life Insurance Company

86 pp

QUESTIONS PRESENTED

The following questions are presented by the Petition for Writ of Certiorari:

1. Whether Alabama Law, as applied below, violates Due Process by allowing the jury to award punitive damages as a matter of "moral discretion," without adequate standards as to the amount necessary to punish and deter and without a necessary relationship to the amount of actual harm caused.
2. Whether Alabama law violated Pacific Mutual's right to Due Process under the Fourteenth Amendment by allowing punitive damages to be awarded against it under a *respondeat superior* theory.
3. Whether the amount of punitive damages in this case was excessive, in violation of Pacific Mutual's Due Process right to be free of grossly excessive, disproportionate damages awards.
4. Whether the suit below, although nominally civil, must be considered criminal in nature as to the punitive damages awarded therein, entitling Pacific Mutual to protection under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.
5. Whether Alabama law discriminates against those defendants subjected to open-ended punitive damages by limiting the amount of such damages which may be awarded against other classes of defendants, without rational basis.
6. Whether the constitutional defects in the award of punitive damages against Pacific Mutual were cured by judicial review and the potential for a remittur.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Pacific Mutual Life Insurance Company states that it is a California mutual insurance company. It has no parent company, nonwholly owned subsidiary or affiliate.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES.....	viii
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE	
A. THE PARTIES.....	2
B. THE ACTION BELOW.....	3
1. The Complaint	3
2. The Trial	3
3. Pacific Mutual's Appeal	4
4. The Decision of the Alabama Supreme Court	4
5. Pacific Mutual's Petition for Rehearing ...	4
C. STATEMENT OF FACTS.....	4
1. Respondents' Prior Coverage	4
2. Mr. Ruffin's Solicitation	4
3. Pacific Mutual Did Not Issue Group Health Policies	5

4. The Separate Applications to Union Fidelity and Pacific Mutual.	5
5. Issuance of the Separate Health and Life Policies	5
6. Pacific Mutual's Agents' Contract Forbade Mr. Ruffin's Conduct	6
7. Cancellation of Union Fidelity's Health Coverage.	6
8. Haslip's Hospitalization	7
9. The Litigation	7
a. The Complaint.	7
b. The Trial.	8
c. The Punitive Damage Jury Instructions	8
d. The Verdict.	9
e. Pacific Mutual's Appeal	10
f. The Alabama Supreme Court Decision	10
g. Pacific Mutual's Petition for Rehearing	10

REASONS FOR GRANTING THIS PETITION...11

I. ALABAMA LAW, AS HERE APPLIED, AND PUNITIVE DAMAGES DOCTRINE GENERALLY, VIOLATES DUE PROCESS BY ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES AS A MATTER OF "MORAL DISCRETION," WITHOUT ADEQUATE STANDARDS AS TO THE AMOUNT NECESSARY TO PUNISH AND DETER AND WITHOUT A NECESSARY RELATIONSHIP TO THE AMOUNT OF ACTUAL HARM CAUSED.	13
---	----

II. ALABAMA LAW VIOLATED PACIFIC MUTUAL'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, BY ALLOWING PUNITIVE DAMAGES TO BE AWARDED AGAINST IT UNDER A <i>RESPONDEAT SUPERIOR</i> THEORY.	16
A. <i>Respondeat Superior</i> Is Not a Constitutionally Permissible Basis for the Imposition of Punitive Damages.	17
III. THE AMOUNT OF THE AWARD OF PUNITIVE DAMAGES IN THIS CASE WAS EXCESSIVE, IN VIOLATION OF PACIFIC MUTUAL'S DUE PROCESS RIGHT TO BE FREE OF GROSSLY EXCESSIVE, DISPROPORTIONATE DAMAGES AWARDS.	20
IV. THE SUIT BELOW, ALTHOUGH NOMINALLY CIVIL, MUST BE CONSIDERED CRIMINAL IN NATURE AS TO THE PUNITIVE DAMAGES AWARDED THEREIN, ENTITLING PACIFIC MUTUAL TO PROTECTION UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.	22
A. The Controlling Test Established by the United States Supreme Court	22

	Page
B. In Alabama, Punitive Damages Are Expressly Imposed for Punishment and Deterrence and Therefore Meet the <i>Mendoza-Martinez</i> Test	23
C. The Fact That Punitive Damages Are Sought in These Cases by Private Plaintiffs, Rather Than the Government, Does Not Prevent the Actions from Being Deemed Criminal in Nature	24
V. ALABAMA LAW DISCRIMINATES AGAINST THOSE DEFENDANTS SUBJECTED TO OPEN-ENDED PUNITIVE DAMAGES BY LIMITING THE AMOUNT OF SUCH DAMAGES WHICH MAY BE AWARDED AGAINST OTHER CLASSES OF DEFENDANTS, WITHOUT RATIONAL BASIS	25
VI. THE CONSTITUTIONAL DEFECTS IN THE AWARD OF PUNITIVE DAMAGES AGAINST PACIFIC MUTUAL IN THIS CASE WERE NOT CURED BY JUDICIAL REVIEW AND THE POTENTIAL FOR A REMITTITUR	26
CONCLUSION	29

LIST OF APPENDICES

APPENDIX A	
OPINION, JEFFERSON COUNTY CIRCUIT COURT, DATED DECEMBER 11, 1987	A1
APPENDIX B	
OPINION, SUPREME COURT OF ALABAMA, RELEASED SEPTEMBER 15, 1989	B1
APPENDIX C	
ORDER DENYING REHEARING BY THE SUPREME COURT OF ALABAMA, DATED NOVEMBER 9, 1989	C1
APPENDIX D	
ORDER DENYING A PETITION FOR STAY BY THE SUPREME COURT OF ALABAMA, DATED DECEMBER 6, 1989	D1
APPENDIX E	
ORDERS GRANTING STAY BY THE SUPREME COURT OF THE UNITED STATES, DATED DECEMBER 22, 1989 AND JANUARY 8, 1990	E1

TABLE OF AUTHORITIES

	Page
Cases	
Aetna Life Ins. Co. v. Lavoie 470 So.2d 1060 (Ala. 1985)	23
Aetna Life Insurance Co. v. Lavoie 475 U.S. 813 (1986)	12
American Society of M.E.'s v. Hydrolevel Corp. 456 U.S. 556 (1982)	18
Autrey v. Blue Cross & Blue Shield Of Alabama 481 So.2d 345 (Ala. 1985)	17
Badgett v. McDonald 304 So.2d 228 (Ala. 1974)	23
Bankers Life & Casualty Co. v. Crenshaw 486 U.S. 71 (1988)	12, 13
Bell v. Wolfish 441 U.S. 520 (1979)	23
Browning-Ferris Industries Of Vermont v. Kelco Disposal, Inc. 10, 11, 13 492 U.S. ___, 109 S.Ct. 2909 (1989).....	14, 16, 20
Coates v. City of Cincinnati 402 U.S. 611 (1971)	13, 15
Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. 155 Cal.App.3d 381 (1984)	14, 15

	Page
Dunn v. Blumstein 405 U.S. 330 (1972)	26
Electrical Workers v. Foust 442 U.S. 42 (1979)	12
Furman v. Georgia 408 U.S. 238 (1972)	28
Gertz v. Welch 418 U.S. 323 (1974), <i>cert. denied</i> , 459 U.S. 1226 (1983)	12
Greenbelt Coop. Publishing Assn. v. Bresler 398 U.S. 6 (1970)	28, 29
Gregg v. Georgia 428 U.S. 153 (1976)	21
Hammond v. City of Gadsden 493 So.2d 1370 (Ala. 1986)	27
Henderson v. Croom 403 F. Supp. 668 (N.D. Ala. 1975)	18
In Re Paris Air Crash 622 F.2d 1315 (9th Cir. 1980), <i>cert. denied</i> , 449 U.S. 926 (1980)	24
In Re Winship 397 U.S. 358 (1970)	24
Jenkins v. Werger 564 F. Supp. 806 (D. Wyo. 1983)	15

	Page
Kennedy v. Mendoza-Martinez 372 U.S. 144 (1963)	22, 23
Kollender v. Lawson 461 U.S. 352 (1983)	13, 15
Lake Shore & Southern Michigan Railway Co. v. Prentice 147 U.S. 101 (1893)	18, 19
Massachusetts Mutual Life Ins. Co. v. Russell 473 U.S. 134 (1985)	12
Mathews v. Eldridge 424 U.S. 319 (1976)	13, 29
McGuffie v. Transworld Drilling Co. 625 F.Supp. 369 (W.D. La. 1985)	19
National States Ins. Co. v. Jones 393 So.2d 1361 (Ala. 1980)	17
Police Dept. of Chicago v. Moseley 408 U.S. 92 (1972)	26
Rosener v. Sears, Roebuck & Co. 110 Cal.App.3d 740 (1980), <i>app. dism'd</i> , 450 U.S. 1051 (1981)	12
Smith v. Gaquen 415 U.S. 566 (1974)	15
Smith v. Wade 461 U.S. 30 (1983)	12

	Page
Solem v. Helm 463 U.S. 277 (1983)	21
Tele-Communications of Key West, Inc. v. United States 757 F.2d 1330 (D.C. Cir. 1985)	26
The Amiable Nancy 16 U.S. (3 Wheaton) 546 (1818)	19
Trop v. Dulles 356 U.S. 86 (1958)	21
2-D's Logging, Inc. v. Weyerhaeuser Co. 632 P.2d 1319 (Or. 1981)	28
U.S. v. Halper 490 U.S. ___, 109 S.Ct. 1892 (1989)	21
United States Ex. Rel. Marcus v. Hess 317 U.S. 537 (1943)	21, 24

United States Constitution

First Amendment	26
Fourth Amendment	21, 23
Fifth Amendment	1, 21, 23, 26
Sixth Amendment	2, 21, 23
Eighth Amendment	10, 23
Fourteenth Amendment	2, 10, 16, 19, 21, 22, 25, 26

Page

Statutes

28 U.S.C. Section 1251(a)	1
42 U.S.C. Section 1983 (1976 Ed., Supp. IV)	12

Publications

Owen, "Punitive Damages in Products Liability Litigation," 49 U.Chi.L.Rev. 1 (1982)	11
Restatement, Agency §217c, Comment C,	18
Wheeler, "The Constitutional Case for Reforming Punitive Damages," 69 Va.L.Rev. 269 (1983)	25

PETITION FOR WRIT OF CERTIORARI

Pacific Mutual Life Insurance Company ("Pacific Mutual") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Jefferson County Circuit Court is unreported [App., *infra*, A1-A16]. The opinion of the Supreme Court of Alabama [App., *infra*, B1-B16] is reported as *Pacific Mutual Life Ins. Co. v. Cleopatra Haslip, et al.*, No. 87-482 (Sept. 15, 1989) (to be reported at 553 So.2d 537 (1989)).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1251(a).

The judgment of the Supreme Court of Alabama was entered on September 15, 1989. A timely petition for rehearing was denied on November 9, 1989 [App., *infra*, C1], and a petition for stay was denied on Dec. 6, 1989 [App., *infra*, D1]. On December 22, 1989 Justice Kennedy issued an order granting Pacific Mutual's application for stay, which was confirmed by the full Court on January 8, 1990. [App., *infra*, E1.]

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with true witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

The Fourteenth Amendment, Section 1 of the United States Constitution provides in relevant part:

"... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. THE PARTIES

Petitioner is Pacific Mutual Life Insurance Company ("Pacific Mutual").

Respondents Cleopatra Haslip, Cynthia Craig, Alma Calhoun and Eddie Hargrove ("respondents") are employees of the City of Roosevelt ("the City") in the State of Alabama. Respondents were participants in an insurance plan sponsored by the City in which Pacific Mutual provided individual life insurance coverage.

B. THE ACTION BELOW

Respondents' action against Pacific Mutual involved a suit seeking punitive damages for the misconduct of one of Pacific Mutual's soliciting agents, Lemmie L. Ruffin, Jr. ("Mr. Ruffin"), who at the time of the alleged acts was acting on behalf of another company, Union Fidelity Life Insurance Company ("Union Fidelity") with respect to a health insurance policy issued by Union Fidelity, not Pacific Mutual.

1. The Complaint

On May 25, 1982 respondents filed their complaint against Pacific Mutual and Mr. Ruffin in the Jefferson County Circuit Court. The complaint claimed damages against Pacific Mutual and Mr. Ruffin for (1) fraud, (2) breach of contract and (3) "bad faith." [CT 4-11.]¹ Mr. Ruffin and Pacific Mutual filed separate Answers. [CT 19, 21.] Later, counsel for Mr. Ruffin filed a Motion to Withdraw which was granted on June 21, 1984. From that time on Mr. Ruffin was not represented by counsel and did not appear at any subsequent proceedings, including the trial. [CT 24.]

Respondents' complaint was amended several times. [CT 12-14, 66-67.] Pacific Mutual filed timely answers to each amended complaint, raising additional defenses and broad based constitutional challenges to an award of punitive damages. [CT 199-205, 225.]

2. The Trial

At trial, the issue of fraud was submitted to the jury. Pacific Mutual was found vicariously liable for the acts committed by Mr. Ruffin. On August 7, 1987, the jury rendered a verdict for respondents in the amount of \$1,077,978. [CT 342-43.] Pacific Mutual timely filed motions for a new

¹ The Clerk's Transcript will hereinafter be designated as "CT." The Reporter's Transcript of the proceeding will hereinafter be designated as "RT."

trial or, alternatively, a judgment notwithstanding the verdict. The motions were denied by the trial court. [CT 344.]

3. Pacific Mutual's Appeal

Pacific Mutual appealed. [CT 345-350.] The matter was briefed, and argued on November 22, 1988. Post-argument letter briefs were submitted by both sides at the request of the court. *Pacific Mutual raised its constitutional challenges to an award of punitive damages at the answer stage, preserved such issues at trial and vigorously advanced those issues on appeal, in its briefs, at oral argument, in the post-trial letter briefs and in its petition for rehearing.*

4. The Decision of the Alabama Supreme Court

The Alabama Supreme Court filed its decision affirming the judgment below, and rejecting Pacific Mutual's federal constitutional challenges to the punitive damages award on September 15, 1989. [App., *infra*, B1-B16.] Two dissenting justices voted to vacate the punitive damages award on constitutional grounds.

5. Pacific Mutual's Petition for Rehearing

Pacific Mutual filed a timely petition for rehearing in the Alabama Supreme Court. The Alabama Supreme Court denied the petition by an order dated November 9, 1989. [App., *infra*, C1.]

C. STATEMENT OF FACTS

1. Respondents' Prior Coverage

Respondents are employees of the City of Roosevelt. The City allowed its employees to purchase a group health insurance policy through the municipality. A policy originally issued by Blue Cross/Blue Shield ("Blue Cross") was cancelled sometime before 1981. [RT 92.]

2. Mr. Ruffin's Solicitation

Sometime in 1981, Mr. Ruffin, who was then a soliciting agent for both Pacific Mutual and Union Fidelity, forwarded a

mail solicitation to the City asking if it was interested in discussing insurance. [RT 431.] The City stated it was. [*Id.*]

Mr. Ruffin later met with the City's mayor, city attorney and city clerk. [RT 131, 433.] Mr. Ruffin presented his Pacific Mutual business card and discussed the City's interest in obtaining health and life insurance. [RT 93, 96, 98-99, 429.]

3. Pacific Mutual Did Not Issue Group Health Policies

While Pacific Mutual issued individual life policies to City employees, it did not underwrite group health insurance policies for municipalities. [RT 429, 442.] Pacific Mutual did, however, allow its agents to broker business with other insurance companies. [RT 469.] Mr. Ruffin at that time was also a licensed agent of Union Fidelity. Union Fidelity, a separate and distinct company from Pacific Mutual, did issue group health insurance to municipalities. [RT 262-63.]

4. The Separate Applications to Union Fidelity and Pacific Mutual

Mr. Ruffin submitted a proposal to the City indicating he would place life insurance with Pacific Mutual and health insurance with Union Fidelity. [RT 219-20, 221, 283, 312-16, 335.] The City approved the proposals, and on August 19, 1981, Mr. Ruffin completed separate applications for the City and its employees for group health coverage with Union Fidelity and individual life policies with Pacific Mutual. [RT 219-21, 283, 312-16, 335.] Mr. Ruffin then submitted the City's application for health insurance to Union Fidelity. The City's application for life insurance was submitted to Pacific Mutual. Pacific Mutual and Union Fidelity are separate companies without any affiliation. [RT 262-60.]

5. Issuance of the Separate Health and Life Policies

Union Fidelity approved the health application and issued group health policy to the City effective September 1, 1981. [RT 255.] Union Fidelity later confirmed the health coverage by letter with the city clerk. [RT 138-139.] Pacific Mutual approved the applications for individual life insurance and

began issuing life insurance coverage to the City's employees. The premium checks for both the life and health insurance policies were collected by Mr. Ruffin. [RT 115-16, 141-42.]

6. Pacific Mutual's Agents' Contract Forbade Mr. Ruffin's Conduct

Mr. Ruffin arranged with Union Fidelity to have premiums and other notices for the group health insurance to be sent to him at his office in the Pacific Mutual branch office in Birmingham. This practice, as to Pacific Mutual, was forbidden under Mr. Ruffin's sales agent's contract with Pacific Mutual. [RT 841.] It appears that Mr. Ruffin failed to remit premiums received by him from the City to Union Fidelity, and Union Fidelity sent lapse notices to respondents through Mr. Ruffin, who did not forward them to respondents. [RT 724-25, 837.] Pacific Mutual's agent in charge of the Birmingham office, Patrick Lupia, was also licensed with Union Fidelity and other companies. There was testimony that Mr. Lupia was aware that Mr. Ruffin was having the Union Fidelity notices sent to him at the Pacific Mutual office. Mr. Lupia denied this, but the jury apparently disbelieved him. [RT 724-75].

7. Cancellation of Union Fidelity's Health Coverage

In the fall of 1981, the Union Fidelity health coverage for the City was cancelled. Shortly thereafter, Mr. Ruffin attempted to obtain replacement health insurance coverage for the City's employees. [RT 472-75, 478-79.] He submitted an application therefor to John Alden Company, apparently an independent insurance broker for Union Fidelity. [RT 455, 456, 479.] Mr. Ruffin's deposition testimony, which was read at trial, was that he continued to collect the health portion of the premiums so that he would have the premium money to submit to the replacement carrier. [RT 454.] An application for health insurance was submitted by Mr. Ruffin to John Alden. Mr. Ruffin received preliminary approval and was assigned a case number. [RT 455, 456-58.] However, before a policy was ever issued, respondent Cleopatra Haslip was hospitalized. [*Id.*]

8. Haslip's Hospitalization

Haslip was hospitalized for a kidney infection on January 23, 1982 before a replacement policy was ever issued. [RT 455, 456-58.] Haslip incurred \$2,500 in hospital bills. Because the hospital could not confirm insurance coverage it required her to pay a cash sum toward her final bill upon her discharge. The hospital records for Haslip's hospitalization do not list Pacific Mutual as the insurer, but instead list another company, Commercial Insurance Company. A claim for the hospitalization was never filed with Pacific Mutual. [RT 235.]

Mr. Ruffin testified that Haslip called him after her discharge, angered about having to write a check to the hospital and demanded her premium payment back. [RT 458-60, 480.] With the deletion of Haslip, there were not enough participating employees for issuance of the replacement policy, so Union Fidelity issued a premium refund check to Mr. Ruffin, which he said he tendered to the city clerk. [RT 460.]

9. The Litigation

a. The Complaint

Respondents commenced this action on May 25, 1982 in the Jefferson Circuit Court alleging that Mr. Ruffin collected premiums but failed to remit them to the insurers so that respondents' coverage lapsed without their knowledge. The complaint claimed damages against Pacific Mutual and Mr. Ruffin for fraud, breach of contract and bad faith. [CT 4-11.] Union Fidelity was not named as a defendant. On June 22, 1982 respondents amended the complaint to add claims for the tort of outrage. Respondents later amended the complaint to further restate claims for fraud and conspiracy. [CT 66-67.] Pacific Mutual filed timely answers to each complaint raising affirmative defenses including constitutional challenges to an award of punitive damages. [CT 199-205, 225.]

b. The Trial

The case was submitted to the jury on respondents' fraud claims on both the health and life insurance policies against Pacific Mutual. The trial court charged the jury that it could impose liability for fraud on Pacific Mutual if Mr. Ruffin knew the representation was false or should have known it was false, suggesting an impermissible negligence standard. [RT 885-86.]

c. The Punitive Damage Jury Instructions

Following the trial court's charge on the issue of liability, the jury was instructed that once it determined there was liability for fraud, it could award punitive damages in its discretion. The court charged as follows:

"Damages is a money award which the law says you should award the plaintiffs. One, to reasonably compensate that plaintiff for the loss that he sustained. Two, in the case of fraud, if you find fraud, you may at your discretion award what is known as punitive damages.

* * *

"Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

"This amount of money is awarded to the plaintiff but is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in

addition to compensatory damages you may in your discretion award punitive damages.

"Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs." [RT 895, 897-98.]

d. The Verdict

On August 7, 1987 the jury rendered a verdict in favor of each of the respondents and determined:

(i) Pacific Mutual was held liable for Mr. Ruffin's acts under the doctrine of *respondeat superior*. Mr. Ruffin was found to have been acting within the course and scope of his employment with Pacific Mutual when he committed the acts at issue in the instant suit;

(ii) Mr. Ruffin had not abandoned his agency relationship with Pacific Mutual; and

(iii) Mr. Ruffin acted fraudulently.

Pacific Mutual was fined over \$1,000,000 for the acts committed by Mr. Ruffin on behalf of Union Fidelity. Respondents were awarded the following amounts:

Cleopatra Haslip	— \$1,040,000; ²
Cynthia Craig	— \$12,400;
Alma Calhoun	— \$15,290;
Eddie Hargrove	— \$10,288.

[CT 342-43.]

Pacific Mutual timely filed a Motion for New Trial, or in the Alternative, Judgment Notwithstanding the Verdict, which was denied on December 11, 1987. [CT 344.]

² Mrs. Haslip's claim was as to the Union Fidelity health insurance policy. Pacific Mutual was therefore fined on a *respondeat superior* basis with respect to insurance it did not issue.

e. Pacific Mutual's Appeal

Pacific Mutual raised a number of state law grounds of error, and raised each of the constitutional arguments regarding the award of punitive damages set forth in the Questions Presented section, above.

f. The Alabama Supreme Court Decision

The Alabama Supreme Court, in a 5 to 2 decision, upheld the award against Pacific Mutual, and filed its decision affirming the judgment below on September 15, 1989.

With respect to Pacific Mutual's constitutional challenges to the punitive damages award, the court held that:

(1) The Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awards in cases between private parties under *Browning-Ferris Industries Of Vermont v. Kelco Disposal, Inc.*; 492 U.S. ___, 109 S.Ct. 2909 (1989);

(2) The Alabama Supreme Court had previously rejected the remaining constitutional arguments submitted by Pacific Mutual in past decisions;

(3) The guidelines previously adopted by the court to be used by trial courts in reviewing punitive damages awards requiring the trial judge to reflect on the record his or her reasons for either interfering or not interfering with a jury's verdict, provided sufficient guidelines and protections against improper jury awards. [App., *infra*, B1-B16.]

(4) The Dissent

Justice Maddox and Justice Steagall of the Alabama Supreme Court voted to vacate the punitive damages award, finding that the punitive damages award in this case violated the Due Process Clause of the Fourteenth Amendment. They also concluded that Alabama's judicial review processes did not cure the violation. [App., *infra*, B14-B16.]

g. Pacific Mutual's Petition for Rehearing

A timely petition for rehearing was filed by Pacific Mutual further addressing the constitutional validity of punitive damages, citing the concurrences in *Browning-Ferris*

Industries Of Vermont v. Kelco Disposal, Inc., 492 U.S. ___, 109 S.Ct. 2909 (1989). The Alabama Supreme Court denied that petition by an order dated November 9, 1989. [App., *infra*, C1.]

REASONS FOR GRANTING THIS PETITION

Over approximately the past fifteen years, punitive damages have changed from a seldom-used remedy reserved for cases of intentional injury and actual malice, involving a strong element of outrageous behavior, to a commonplace part of virtually every tort action, products liability case (even those based upon strict liability), and in many breach of contract cases, based upon an allegation of "bad faith," tortious breach. Perhaps most perniciously, in these days of "Rambo litigation," punitive damages are frequently sought in "defensive" counter-claims raised in an effort to deprive plaintiffs of their day in court through the *in terrorem* effect of the cost of defense and the unpredictable, discretionary nature of these awards.

This explosion of punitive damages claims has (i) rapidly escalated both the number and the size of these awards, (ii) expanded the types of actions in which they are awarded, most notably into contract cases, and (iii) changed the criteria justifying such awards. The requirement of actual malicious, outrageous behavior with evil intent has been replaced by "conscious" or "reckless" disregard of the rights of others.

The situation has so changed that an advocate of such damages, if properly controlled, Professor Owen, in "*Punitive Damages in Products Liability Litigation*," 49 U.Chi.L.Rev. 1 (1982), wrote, concerning multimillion dollar awards, at page 6:

"Such awards have become well accepted in principle, and my concern is now that large awards of this type are becoming almost common. . . . Large assessments of punitive damages may not yet be a major threat to the continued viability of most

manufacturing concerns, *but the increasing number and size of such awards may fairly raise concern for the future stability of American industry.*" [Emphasis added.]

As shown by the award against Pacific Mutual in this case, juries, and reviewing trial and appellate courts, have free and untrammelled discretion regarding whether and how much to punish.

Justice Elkington, in *Rosener v. Sears, Roebuck & Co.*, 110 Cal.App.3d 740 (1980), *app. dismissed*, 450 U.S. 1051 (1981) stated this matter succinctly, at page 759:

"Placing unrestricted power in a jury to direct punishment for "evil intent" by compelling the "evildoer" to pay money to another without right thereto, seems foreign to any concept of due process known to me."

Judicial oversight at present does no more than shift discretion to the judge or panel of judges. All of the "tests" for the validity of these awards boil down to the subjective determination of whether the particular court feels the award was excessive, based upon, as with jurors, their individual backgrounds, temperament and societal concerns.

While this Court has never determined whether or not the procedures involved in civil punitive damages cases satisfy Due Process requirements, it has banned punitive damages in a broad category of defamation cases [*Gertz v. Welch*, 418 U.S. 323, 350 (1974), *cert. denied*, 459 U.S. 1226 (1983)], banned punitive damages in union fair representation cases [*Electrical Workers v. Foust*, 442 U.S. 42, 53 (1979)], found ERISA pre-emption precluded punitive damages in self-funded employee benefit plans [*Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)]; split 5-4 over the availability of such damages in actions under 42 U.S.C. Section 1983 (1976 Ed., Supp. IV) [*Smith v. Wade*, 461 U.S. 30 (1983)]; and expressed recognition of serious constitutional issues as to punitive damages in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *Bankers Life & Casualty Co. v. Crenshaw*,

486 U.S. 71 (1988); and *Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. ___, 109 S.Ct. 2909 (1989), but found that such issues had not been properly raised in those cases.

This is an appropriate case for this Court to examine the present state of punitive damages doctrine to determine whether Due Process standards are met, considering the free reign given to juries by that doctrine to punish selectively, to indulge bias, prejudice and any wealth redistribution inclinations they may have, and to exercise standardless discretion to render awards bearing no necessary relationship to actual harm caused.

I. ALABAMA LAW, AS HERE APPLIED, AND PUNITIVE DAMAGES DOCTRINE GENERALLY, VIOLATES DUE PROCESS BY ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES AS A MATTER OF "MORAL DISCRETION," WITHOUT ADEQUATE STANDARDS AS TO THE AMOUNT NECESSARY TO PUNISH AND DETER AND WITHOUT A NECESSARY RELATIONSHIP TO THE AMOUNT OF ACTUAL HARM CAUSED

Punitive damages are clearly punishment. As such, they must be awarded under constitutionally adequate standards to guide juries and reviewing court as to when they should be imposed, and as to how much is appropriate to punish and deter [*Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Kollender v. Lawson*, 461 U.S. 352, 358 (1983); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (concurring opinion); *Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. ___, 109 S.Ct. 2909 (1989)].

In the *Bankers Life & Casualty Co.*, and *Browning-Ferris* cases, above, the Court declined to rule on Due Process challenges to punitive damages because the issues were "not

pressed or passed upon below." Justice O'Connor, however, in a concurring opinion joined by Justice Scalia, while concluding the issues should not be reached in that case, stated at 486 U.S., at pages 87-88:

"Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause . . .

"Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, 'the impact of these windfall recoveries is unpredictable and potentially substantial.'

" . . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."

In *Browning-Ferris*, above, Justice Brennan, joined by Justice Marshall, stated, at 109 S.Ct. 2909 at page 2923:

"I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."

The jury (or trial court) process which appears to trouble the Court was described in *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381 (1984), in which the Court stated, at page 388:

"The process through which a fact finder finds punitive damages is somewhat contradictory. On the one hand, the court or jury must be sufficiently disturbed to conclude the defendant must be punished. On the other hand, although outraged, the fact finder cannot be vindictive. The channeling of just the correct quantum of bile to reach the correct

level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. *Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns.* The process is further complicated by the lack of objective criteria from either the Legislature or the courts as to 'how much' is necessary to punish and deter." (Emphasis added.)

This is exactly the arbitrary and discriminatory enforcement condemned by Due Process.

Because the decision of whether or not to award punitive damages is committed to the moral discretion of each jury, imposition of such punishment is necessarily arbitrary and unpredictable. *Devlin* recognized that what may outrage one jury, and lead it to award substantial punitive damages, may leave another jury unmoved.

The constitutional invalidity of this type of situation was described by this Court in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) as follows at page 614:

"Many types of behavior can be restricted or even prohibited but not constitutionally, 'through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a [law enforcement officer] is annoyed.' "

[See also, *Jenkins v. Werger*, 564 F. Supp. 806, 808 (D. Wyo. 1983)].

Neither may juries be allowed to pursue their personal predilections. [*Kollender v. Lawson*, 461 U.S. 352, 358 (1983); *Smith v. Gaquen*, 415 U.S. 566, 575 (1974)].

Here, in an instruction typical in these cases, the jury was charged:

"Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by

the evidence and the necessity of preventing similar wrongs." [RT 898].

As stated by Justice Brennan regarding a very similar instruction, in *Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. ___, 109 S.Ct. 2909 at page 2923:

"[G]uidance like this is scarcely better than no guidance at all . . . The point is . . . that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best."

In this case, which again is typical, the jury was, as noted by Justice Brennan in *Browning-Ferris* [109 S.Ct. 2909 at page 2923, "left largely to [itself] in making this important, and potentially devastating, decision." Pacific Mutual's right to Due Process was violated by this unbridled jury discretion. The rights of other defendants in substantially identical situations of jury discretion have been violated in the past and are at risk in the future. Guidance from this Court is needed.

II. ALABAMA LAW VIOLATED PACIFIC MUTUAL'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, BY ALLOWING PUNITIVE DAMAGES TO BE AWARDED AGAINST IT UNDER A *RESPONDEAT SUPERIOR* THEORY

Pacific Mutual was "punished" by an award in excess of \$1 million because of the fraudulent conduct of its former soliciting agent, Lemmie Ruffin, where:

(1) Mr. Ruffin was at the time acting for Union Fidelity not Pacific Mutual;

(2) The health insurance policy at issue in respondents' suit was sought from and issued by Union Fidelity;

(3) Mr. Ruffin obtained Union Fidelity's agreement to send premium notices to Mr. Ruffin, not Pacific Mutual;

(4) Pacific Mutual never approved of such conduct;

(5) Pacific Mutual is a distinct and separate entity from Union Fidelity and had no control over Union Fidelity;

(6) Pacific Mutual was unaware of Mr. Ruffin's conduct and was given no opportunity to address the situation prior to the lawsuit.

It seems fundamental that before a corporation is fined over one million dollars, it should be shown to have done something wrong. That was not done here. As stated in the Order of the Trial Court dated December 11, 1987 [App., *infra*, A7], the evidence below of intentional fraud was evidence that Mr. Ruffin intentionally converted the premiums and, the Trial Court stated, this element of intent on Mr. Ruffin's part was the basis upon which plaintiffs below were awarded punitive damages against Pacific Mutual.

When punitive damages were imposed on Pacific Mutual on a *respondeat superior* basis, the focus for determination of the amount of the damages shifted from Mr. Ruffin to Pacific Mutual. It is self-evident that the jury would not have imposed a fine of over one million dollars on Mr. Ruffin. This factor contributed greatly to the fundamental unfairness, excessiveness and disproportionality of the fine imposed in this case, even though no wealth evidence was admitted.

A. *Respondeat Superior* Is Not a Constitutionally Permissible Basis for the Imposition of Punitive Damages

The settled law of Alabama applied by its Supreme Court in this case allowed punitive damages to be awarded against Pacific Mutual, as principal, for fraud by its purported sales agent, without any showing of authorization or ratification, and in fact, allows such liability even if, as here, the principal has forbidden the conduct [*Autrey v. Blue Cross & Blue Shield Of Alabama*, 481 So.2d 345 (Ala. 1985); *National States Ins. Co. v. Jones*, 393 So.2d 1361 (Ala. 1980)] and even though, as

in this case, the fraud was committed strictly for the agent's benefit [*Henderson v. Croom*, 403 F. Supp. 668 (N.D. Ala. 1975)].

Once the jury below found that Mr. Ruffin was acting within the scope of his role as a Pacific Mutual agent, Pacific Mutual became subject to vicarious liability for both the compensatory and punitive damages which would otherwise have been awardable against Mr. Ruffin.

The million dollar fine imposed upon Pacific Mutual for its sales agent's conduct is a punitive sanction imposed for someone else's unauthorized, unratified, and uncondoned wrongdoing. This constituted a violation of Due Process.

In *Lake Shore & Southern Michigan Railway Co. v. Prentice*, 147 U.S. 101 (1893), this Court held, in a diversity case, that a company could not be held liable for punitive damages for torts by employees unless it authorized or ratified the action.

The *Lake Shore* case has been followed, questioned and criticized but remains good law. In *American Society of M.E.'s v. Hydrolevel Corp.*, 456 U.S. 556 (1982), *Lake Shore* was questioned by way of *dictum* in a footnote. In *Hydrolevel*, the American Society of Mechanical Engineers ("ASME") had been subjected to an award of treble damages in an antitrust action, in which the jury had found that the improper actions had been ratified by ASME. ASME argued that it could not, under *Lake Shore*, be held liable for punitive damages on an apparent authority basis, although the jury had found ratification. The majority opinion stated that apparent authority was an appropriate basis for antitrust liability, given the purposes of that legislation.

Addressing the treble damages award, the majority found, at pages 574-75, a sufficient *non-punishment* purpose for such damages in antitrust cases to distinguish *Lake Shore*. Furthermore, the majority cited Restatement, Agency §217c, Comment C, for the proposition that the rule limiting a principal's liability for punitive damages does not apply to special

statutes giving treble damages. In a footnote, the majority stated that *Lake Shore* might have been decided against the then trend of cases, but merely distinguished the case in an antitrust context, but did not overrule it. The Chief Justice, and Justice Powell, joined by Justices Rehnquist and White, dissented on the ground that apparent authority was not a permissible basis for punitive damages, even in antitrust actions.

The *Lake Shore* opinion stated sound public policy. This was recognized in *McGuffie v. Transworld Drilling Co.*, 625 F.Supp. 369 (W.D. La. 1985), in which the Court reviewed the authorities in the area and concluded, at page 373:

"... I do not find the policy arguments made [in favor of the Restatement rule] persuasive. Deterrence and punishment have been the traditional policy arguments in favor of imposing punitive damages.

I agree with *McCormick* that 'there would seem to be little justification for punishing the master for willfulness or wantonness of which the agent is alone guilty.' C.T. McCormick, *Handbook on the Law of Damages* Section 80 at 282 (1935). Also, I seriously question whether the threat of punitive damages would enable the employer to perform the difficult task of predicting or controlling the reckless or malicious conduct of its employees which is generally sporadic."

It is submitted that punitive damages cannot, consistently with the Due Process Clause of the Fourteenth Amendment, be imposed upon a corporation for unauthorized, unratified and in fact forbidden conduct of an agent. This Court, as far back as *The Amiable Nancy*, 16 U.S. (3 Wheaton) 546, 558-59 (1818) announced the rule that an innocent principal could not be held for punitive damages for lawless conduct which it did not direct, contenance or participate in. Justice Story, in so holding, referred to punitive damages as "resting in discretion, and

intended to punish offenders." An innocent principal is not an offender.

The basic notion of fundamental fairness which Due Process embodies requires that punishment based upon a requisite mental state not be imposed upon innocent principals.

The time is ripe for this Court to reassess punitive damages including the imposition thereof on a vicarious liability basis. This case provides both an appropriate opportunity to do so, and points up the great need for this Court to provide guidance in this area.

III. THE AMOUNT OF THE AWARD OF PUNITIVE DAMAGES IN THIS CASE WAS EXCESSIVE, IN VIOLATION OF PACIFIC MUTUAL'S DUE PROCESS RIGHT TO BE FREE OF GROSSLY EXCESSIVE, DISPROPORTIONATE DAMAGES AWARDS

The hospital bill of Mrs. Haslip which was not paid under the lapsed Union Fidelity policy was \$2,500. The award in excess of this amount, in excess of \$1,000,000, was punitive damages. It is submitted that this award was excessive under Due Process standards.

In *Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. ___, 109 S.Ct. 2909 (1989), Justice Brennan, in his concurrence, suggested that Due Process forbids excessive damages in civil cases, stating, at page 2923:

"Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive,' *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportionate to the offense and

obviously unreasonable,' *St. Louis, I.M. & S.R. Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915); *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512, 522-23 (1885). I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits."

Because punitive damages are punishment sanctions, it is submitted that Due Process further constrains excessive awards.

A number of decisions of this Court have addressed the issue of when nominally civil cases are penal in nature, including *U.S. Ex Rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Trop v. Dulles*, 356 U.S. 86 (1958); and *U.S. v. Halper*, 490 U.S. ___, 109 S.Ct. 1892 (1989).

As applied to punitive damages awards, these cases suggest that (i) if the purpose of the sanctions is punishment, certain Fourth, Fifth and Sixth Amendment protections would apply under the Due Process Clause of the Fourteenth Amendment, (ii) no remedial purpose can be found where the amount of the sanctions exceeds the amount which can fairly be determined to be remedial as compensation for actual loss, and (iii) in government actions and *qui tam* actions, under federal statutes, double damages do not constitute punishment where the aggregate amount thereof does not exceed such compensation, broadly viewed.

The general rule regarding whether a punishment sanction is excessive appears to be that punishment must not be grossly out of proportion to the severity of the offense [*Trop v. Dulles*, 356 U.S. 86 (1958); *Gregg v. Georgia*, 428 U.S. 153 (1976)]. In *Solem v. Helm*, 463 U.S. 277 (1983), this Court sought to set some objective criteria for determining whether a sanction was disproportionate.

It is submitted that the excessiveness of the award in this case, and the number of multimillion dollar awards being rendered shows the necessity for this Court to make a broad review of punitive damages doctrine on Due Process grounds, and require that they bear a necessary relationship to actual harm caused.

IV. THE SUIT BELOW, ALTHOUGH NOMINALLY CIVIL, MUST BE CONSIDERED CRIMINAL IN NATURE AS TO THE PUNITIVE DAMAGES AWARDED THEREIN, ENTITLING PACIFIC MUTUAL TO PROTECTION UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. The Controlling Test Established by the United States Supreme Court

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), this Court established the test and analytic process to be applied to determine when the full protections guaranteed by the Constitution to criminal defendants must be given to defendants in a nominally civil action. In *Mendoza-Martinez*, a defendant had been denaturalized under Section 401(j) of the Nationality Action of 1940, for leaving and remaining outside of the United States to evade or avoid military service. The court held the statute to be invalid because it deprived the defendant of citizenship, *as punishment*, without the safeguards guaranteed by the Fifth and Sixth Amendments.

In reaching this conclusion, this Court stated, at page 167:

"...[F]orfeiture of citizenship is a penalty for the act of leaving or staying outside the country to avoid the draft. This being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its

incidents, . . . *If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further.*"
[Emphasis added.]

The court in *Mendoza-Martinez* thereby flatly stated the position that if a sanction is punishment, the procedural safeguards of the Fifth and Sixth Amendments must be applied.

This appears to be a single, overriding standard for determining the applicability of criminal procedural safeguards under the Fourth, Fifth and Sixth Amendments, and logically, the Eighth Amendment.

The criteria for determining whether or not the sanction is punishment are (i) is the announced purpose to punish, as in *Mendoza-Martinez*, or (ii) if the purpose is unstated or stated to be a civil remedy, do other factors (enumerated in *Mendoza-Martinez*) show that a non-punishment purpose can be assigned which is not overridden by the punishment impact of the sanction?

B. In Alabama, Punitive Damages Are Expressly Imposed for Punishment and Deterrence and Therefore Meet the Mendoza-Martinez Test

Punitive damages in Alabama, as a matter of the common law of the state, are authorized in various categories of cases, and may be recovered by a plaintiff to punish the defendant and deter future similar conduct. [*Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060 (Ala. 1985); *Badgett v. McDonald*, 304 So.2d 228 (Ala.Civ.App. 1974)].

The United States Supreme Court, in *Bell v. Wolfish*, 441 U.S. 520 (1979), stated at page 589, n.20:

"Retribution and deterrence are not legitimate non-punitive governmental objectives."

C. The Fact That Punitive Damages Are Sought in These Cases by Private Plaintiffs, Rather Than the Government, Does Not Prevent the Actions from Being Deemed Criminal in Nature

Plaintiffs in these cases act as private attorneys general in seeking punitive damages, the award of which is not a personal right, but rather, is a public interest in punishment and deterrence [See, *In Re Paris Air Crash*, 622 F.2d 1315, 1319-1320 (9th Cir. 1980), *cert. denied*, 449 U.S. 926 (1980)]. The involvement of the states in imposing punishment through punitive damages is clear. It is submitted that a state cannot evade according constitutional protections in inflicting punishment and retribution by providing that the punishment be imposed by a private attorney general. Therefore, the criminal proceeding protections must be accorded either directly under the Amendments stated above or through the Due Process Clause of the Fourteenth Amendment. See in this regard, *United States Ex. Rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which the Court considered whether or not a sanction in a case having a private party plaintiff was in fact a criminal case. While finding that the purpose of the sanction was not punishment, and therefore that the incidents of a criminal trial were not required, the discussion and analysis of the Court assumed that if the purpose were punishment, such incidents would have been required.

In this case, Pacific Mutual was denied a beyond a reasonable doubt burden of proof [*In Re Winship*, 397 U.S. 358, 364 (1970)].

Again, this is an area in which guidance from this Court is needed to establish the procedural safeguards to which defendants are entitled in punitive damages actions.

V. ALABAMA LAW DISCRIMINATES AGAINST THOSE DEFENDANTS SUBJECTED TO OPEN-ENDED PUNITIVE DAMAGES BY LIMITING THE AMOUNT OF SUCH DAMAGES WHICH MAY BE AWARDED AGAINST OTHER CLASSES OF DEFENDANTS, WITHOUT RATIONAL BASIS

Alabama punitive damages law, as it applied to Pacific Mutual in this case, provided for punitive damages in unlimited amount. The jury charge gave no guidance and imposed no limit on the severity of the punishment.

Alabama, however, without a rational basis for the classifications, limits punitive damages to double or treble damages in at least six categories of cases. These classifications are wholly arbitrary, and violate the Equal Protection Clause of the Fourteenth Amendment.

Professor Wheeler in his article "The Constitutional Case for Reforming Punitive Damages," 69 Va.L.Rev. 269 (1983), analyzed this situation as follows as pages 299-300:

"A fundamental problem with all statutory schemes that limit punitive damages for only selected types of wrongful conduct and allow discretionary punitive damages for all others is that the selective treatment is arbitrary. The whole range of problems, risks and inconsistencies that characterize discretionary punitive damages proceedings inheres in all such proceedings, regardless of the type of tortious conduct that gave rise to the cause of action."

No rational basis is apparent for limiting punitive damages in cases of usury, restraint of trade, deceptive trade practices or various areas of consumer fraud, while leaving Pacific Mutual subject to open-ended punitive damages for Mr. Ruffin's fraud.

In this case, the commercial speech rights of Pacific Mutual are impacted by the imposition of punitive damages liability against it for the unauthorized, unratified fraud by its sales agent. The potential for such liability must inhibit the actual and symbolic speech of companies which must act through representatives, in the selection of representatives and in communications with such representatives.

Further, Pacific Mutual's access to the courts is impacted in such a case, because it cannot defend itself by showing that it acted properly in all respects. The fine is imposed for the "evil intent" of another, acting in a wholly unauthorized and unratified manner, against the interest of Pacific Mutual, and solely for the benefit of himself.

Where fundamental rights such as First Amendment speech rights and Fifth and Fourteenth Amendment rights of access to courts are impacted, as it is submitted they are in these cases through self-censorship resulting from unreasonable risk and unpredictability, equal protection requires more than an apparent rational relationship to a proper state objective [*Police Dept. of Chicago v. Moseley*, 408 U.S. 92, 99 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985)]. Laws with a potential for impingement on such rights must be "tailored" to serve a substantial governmental interest [*Police Dept. of Chicago v. Moseley*, 480 U.S. 92, 99 (1972)]. Punitive damages are not tailored.

VI. THE CONSTITUTIONAL DEFECTS IN THE AWARD OF PUNITIVE DAMAGES AGAINST PACIFIC MUTUAL IN THIS CASE WERE NOT CURED BY JUDICIAL REVIEW AND THE POTENTIAL FOR A REMITTITUR

The Alabama Supreme Court stated at page 11 of its opinion [App., *infra*, B13] that review of the punitive damages award by the trial court under the procedures established in

Hammond v. City of Gadsden, 493 So.2d 1370 (Ala. 1986) further established that the Due Process Clause had not been violated.

In *Hammond*, the Alabama Supreme Court established seven factors to be considered by the trial court in reviewing a challenged award of punitive damages. They are:

- (i) whether there is a reasonable relationship between the punitive damages and the harm done by the defendant;
- (ii) the reprehensibility of defendant's conduct;
- (iii) the profit to defendant from such conduct;
- (iv) the wealth of the defendant;
- (v) the costs of litigation;
- (vi) whether criminal sanctions have been imposed; and
- (vii) whether other civil awards have been made against defendant for the same conduct.

These factors are largely unreviewable, and merely transfer discretion to the reviewing court. For example, the "reasonable relationship" test has proved to be meaningless because virtually any ratio of punitive to actual damages can be and has been held to be "reasonable." These factors amount to no more than the "gentle test of excessiveness," particularly given the extraordinary deference given to the jury decisions in these cases. At most, use of the language of these criteria merely disguise the true bases of the court's decisions, which are subjective value judgments.

Justice Maddox, in his dissent below [App., *infra*, B16] stated his view of these criteria as follows:

"While I applaud the procedure this Court has adopted to review and revise the jury's decision based upon its 'standardless discretion,' I cannot believe that procedure is sufficient to accord to litigants all the due process protection the Constitution envisions." [Footnote omitted.]

It is submitted that judicial review does not and cannot cure the constitutional defects in the punitive damages award in this case. A procedure for review of a decision made under an unconstitutional law does not and cannot cure the unconstitutionality of the law. [See *Furman v. Georgia*, 408 U.S. 238 (1972); cf. *Greenbelt Coop. Publishing Assn. v. Bresler*, 398 U.S. 6, 7-11 (1970).]

In Alabama, as in most states, extraordinary deference is given to the jury's decision as to punitive damages, and a jury punitive damage award will only be disturbed if it is, in the judgment of the reviewing court, so excessive as to show that it must have been the product of bias, passion, prejudice, corruption or other improper motive.

This standard of review leaves such a broad field for unfettered jury discretion that it cannot cure underlying defects.

Unlike the appellate review process in criminal matters, in punitive damages cases the appellate process itself lacks clear and consistent standards. This fact creates a risk of its own rather than curing the constitutional deficiencies found at the trial stage. In *2-D's Logging, Inc. v. Weyerhaeuser Co.*, 632 P.2d 1319 (Or. 1981), the appellate court made note of this problem, stating at page 1326:

"Punitive damages doctrines have resulted in a perplexing and contorted mode of judicial review . . . which, in reality, is an imprecise pattern of subjective judicial reactions mixed with some episodes of deference to jury verdicts. . . . At least in cases where there is no specific statutory authorization for their award, the imposition of punitive damages involves a policy or value judgment."

Because the jury was not instructed to adhere to any ascertainable standard or to apply any specified set of factors, it is impossible to determine whether the jury properly applied or ignored any guidelines or set of factors. The award is therefore invalid.

In *Greenbelt Coop. Publishing Assn. v. Bresler*, 398 U.S. 6 (1970), this Court stated the matter as follows, at page 13:

"For when it is impossible to know, in view of the general verdict returned whether the jury imposed liability on an impermissible ground, the judgment must be reversed and the case remanded."
[Citations omitted.]

It is submitted that under the three-part test of procedural Due Process set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the provision for remittitur by reviewing trial and appellate courts does not satisfy the requirements of Due Process for adequate limits on jury discretion.

The concern expressed by this Court, that there is a lack of objective standards limiting the jury's imposition of punishment, and juries are left free to render awards without any necessary relationship to actual harm, cannot be met by the generalized, subjective and highly judgmental factors suggested by the Alabama Supreme Court.

CONCLUSION

Punitive damages law, as presently applied, is overwhelmingly lacking in fundamental fairness. The law gives no fair notice of prohibited conduct because of the vague and largely contentless criteria upon which the awards are founded. Juries are sent to deliberate with no meaningful standards to guide them as to the amount of punitive damages awardable. This unbridled discretion leads to arbitrary and unpredictable awards.

Under the jury instructions given in this case, which appear typical, discussed above, the jury was left free

(i) to give free reign to biases and prejudices and to punish selectively;

(ii) to allow others "guilty" of equally "reprehensible" conduct to go unpunished;

- (iii) to punish unpopular and target defendants, and;
- (iv) to render awards with no necessary relationship to actual harm caused.

Judicial review, in the absence of objective limits on jury discretion, merely transfers discretion to the courts.

The unpredictability of the outcome of any punitive damages case submitted to a trier of fact has led to actions which are *in terrorem* and extortionate in nature.

This situation requires remedy by this Court. It is submitted that Pacific Mutual's Petition should be granted.

February 7, 1990

Respectfully submitted,

Of Counsel:

VICKI W.W. LAI
ADAMS, DUQUE
& HAZELTINE

BRUCE A. BECKMAN
Counsel of Record
ADAMS, DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

OLLIE L. BLAN, JR.
BERT S. NETTLES
SPAIN, GILLON, GROOMS,
BLAN & NETTLES

J. MARK HART
SPAIN, GILLON, GROOMS,
BLAN & NETTLES
2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

Attorneys for Petitioner
Pacific Mutual Life Insurance
Company

APPENDIX A

-A 1-

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

CLEOPATRA HASLIP, et al
Plaintiffs

vs.

PACIFIC MUTUAL LIFE
INSURANCE COMPANY, et al
Defendants

CV82-2453

ORDER

The defendants' motions for judgment notwithstanding the verdicts or in the alternative for a new trial is denied and the jury's verdicts in favor of Cleopatra Haslip, Alma Calhoun, Cynthia Craig, and Eddie Hargrove, is to stand. Essential to this ruling is an outline of the relevant facts and parties followed by discussion of the legal issues raised by the defendants in their motions.

I. FACTS:

In May, 1981 Roosevelt City seeking additional health and life insurance for its employees, responded to a Pacific Mutual advertisement, and contacted Mr. Lemmie Ruffin, an agent of Pacific Mutual Life Insurance Company. The purpose of this meeting was to have issued a group health and life insurance policy for participating employees. Mr. Ruffin presented the city with a Pacific Mutual business card, utilized Pacific Mutual brochures and displayed a Pacific Mutual schedule of benefits, (which also had Union Fidelity's name typed in.) After the discussions, Ruffin issued a group

policy for Roosevelt City, placing life insurance with Pacific Mutual and health insurance with Union Fidelity. The apparent reason for placing the health insurance with Union Fidelity was that Pacific Mutual did not write group health policies for municipalities. Though Mr. Ruffin was an employee for Pacific Mutual, he had additional licenses with other insurance companies, including Union Fidelity. The participating employees paid their premiums by way of payroll deductions and the clerk of Roosevelt City wrote a check periodically to cover the premiums. Mable Poindexter, the Clerk for Roosevelt City, testified that Ruffin spoke only of Pacific Mutual and indicated that Union Fidelity was a subsidiary of Pacific Mutual. On October 1st, unbeknownst to the participating employees, the policies were cancelled for non-payment of premiums, because the cancellation notice from both Union Fidelity and Pacific Mutual were sent to Ruffin who continued to collect premiums from Roosevelt City. Earlier, Mr. Ruffin, with the aid of local Pacific Mutual office manager, Mr. Patrick Lupia, had the cancellation notices sent to him rather than Roosevelt [sic] City. Consequently, neither Roosevelt City nor its employees were aware that the policies were cancelled and continued to send premium payments to Mr. Ruffin. Only later, when Ms. Cleopatra Haslip was hospitalized, was it discovered that the policies were cancelled.

The individual parties and witnesses are as follows:

A. CLEOPATRA HASLIP

Ms. Haslip first met with Ruffin in August 1981 when he represented himself as a Pacific Mutual agent. Throughout their conversation about health insurance, Ms. Haslip always believed that the insurance policy would be furnished by Pacific Mutual. Beginning

September 1, 1981, Ms. Haslip had her insurance premiums deducted from her paycheck. These premiums were deducted monthly and were effective from August 1981 through January 1982. Ms. Haslip only became aware of her lack of insurance when she entered the hospital on or about January 24, 1982. After incurring \$2500 in hospital debts and believing she was covered by Pacific Mutual Insurance Company, she was shocked to discover that her policy had been cancelled — especially since she had never asked Ruffin to cancel it. Although Ms. Haslip had paid premiums from August 1981 to January 1982, in actuality she and the other plaintiffs only had health insurance coverage for one month (September 1981) and life insurance for two months (October and November 1981).

While Ms. Haslip and the other plaintiffs had no knowledge that their insurance had been cancelled, Lemmie Ruffin knew of the cancellation, yet he continued to have the premium payments sent to him. In September, 1981 Ruffin collected the first month's premium check (which was made payable to Union Fidelity). The plaintiffs were covered their first month; however, beginning October 1, 1981 the premiums were made payable to Ruffin who continued to collect the premiums. These payments were drawn on Roosevelt City checks and were paid as follows: On August 26 a check for \$430.02 was made payable to Union Fidelity, then two checks which were later voided were written and on September 4 a check was written to Pacific Mutual in the amount of \$149.16. On September 8 another check was made payable to Pacific Mutual for \$71.45. October 20 a check for \$105.90 was made payable to Lemmie Ruffin. On November 6 a check for \$268.68 was made payable to Lemmie Ruffin. December 11 a check for \$76.90 was made payable to Lemmie Ruffin and then again, a check for \$268.68 was made

payable to Lemmie Ruffin on January 15. It is important to note that at all times, Lemmie Ruffin collected the premiums from Roosevelt City.

B. ALMA CALHOUN

Ms. Calhoun, the Sight Manager for the Elderly Program for Roosevelt City, also discussed an insurance program with Ruffin. Ruffin presented Ms. Calhoun with Pacific Mutual brochures and a Pacific Mutual business card. Ms. Calhoun filled out one application for a package deal of health and life insurance, believing this policy was with Pacific Mutual. She denies knowing anything about Union Fidelity and did not receive a lapse notice on her insurance policy. Like Ms. Haslip, Ms. Calhoun paid her premiums monthly and only learned of the cancellation after news of Ms. Haslip's cancellation.

C. CYNTHIA CRAIG

Ms. Craig, a teacher's aide with Roosevelt City, also paid premiums from August 1981 through January of 1982. Her discussions with Ruffin led her to believe that her health insurance was covered by Pacific Mutual. She also was given no lapse notice, nor was Ms. Craig told that her health insurance had been cancelled.

D. EDDIE HARGROVE

Mr. Hargrove was an employee in the Street Department of Roosevelt City. He recalls discussing a "group plan" insurance coverage with Ruffin, but decided to purchase only life insurance from Ruffin and Pacific Mutual. Mr. Hargrove paid premiums for life insurance

from September through January of 1982. As is the case with the other plaintiffs, he received no lapse notice nor notice of cancellation.

E. MABEL POINDEXTER

Mabel Poindexter is the Clerk for Roosevelt City who wrote the premium checks to Mr. Ruffin. When, at first, Ruffin asked her to make the checks payable to Union Fidelity, she acquiesced upon his assurances that Pacific Mutual was Union Fidelity's parent company. Ms. Poindexter never took out health insurance, nor did she receive a lapse notice from Pacific Mutual. Ms. Poindexter only learned of the cancellation when Ms. Haslip contacted her, at which point Mr. Ruffin brought the claim form to the city, (which turned out to be invalid numbers). Ms. Poindexter then gave the claim forms to Ms. Haslip's daughter who brought them to the hospital.

F. DEBORAH AULT

Deborah Ault worked in a secretarial capacity for Pacific Mutual, answering phones, receiving mail, typing for agents and doing personal typing for Mr. Lupia. She testified that she had seen insurance premium checks made out to Lemmie Ruffin and she informed Mr. Lupia of this news. She also recounted telephone calls from customers complaining about receiving premium notices for premiums which they had already paid.

G. RALPH PASSMAN

In his deposition, Ralph Passman stated that his health insurance policy began September 1 and was terminated for non-payment of premiums on September 30, 1981,

that his termination notice was sent to Mr. Patrick Lupia, at Mr. Lupia's request, and further that another termination notice was sent to Mr. Lemmie Ruffin. He also stated that no other premiums were received for the health insurance and that the cancellation notices sent to Mr. Lupia and Mr. Ruffin were the only ones sent out. In other words, the plaintiffs never received notice of cancellation.

H. FRANK JOHNSON

Mr. Frank Johnson is a training director of Debit Life Insurance Company, Protective Industrial Insurance Company. Investigating a problem for a client's mother, Lennie B. Spencer, he discover [sic] that Mrs. Spencer had been paying on a life insurance policy that did not exist. Payments were made in the fall and winter of 1981 and 1982 and her agent was Lemmie Ruffin.

I. LIONEL WILLIAMS

Mr. Williams, a grocery store owner was also looking for group health insurance for his employees and spoke with Mr. Ruffin, as well. Mr. Williams testified that he also was paying for insurance that he later discovered did not exist. He recalled speaking with Mr. Lupia, calling the main office of Pacific Mutual in California, and then being referred locally. He was never satisfied with his insurance, never had the medical bills paid, and as a result, he lost an employee.

II. LEGAL ISSUES

A. CAN A PRINCIPAL BE HELD LIABLE UNDER RESPONDEAT SUPERIOR FOR FRAUD OF AN AGENT?

The Supreme Court of Alabama has repeatedly stated that a corporation is liable for the torts of its employees, both agent and servant, based upon the principal of Respondeat Superior, not the doctrine of agency. "The actual question to be determined is whether the act complained of was done either by agent or servant while acting within the course and scope of his employment; the corporation or principal may be liable in tort for the acts of its servants or agents done within the scope of employment, real or apparent, even though it did not authorize or ratify such acts or even expressly forbade them." *Autrey v. Blue Cross and Blue Shield of Alabama* 481 So.2d 345 (Ala. 1985), *National States Insurance Company v. Jones*, 393 So.2d 1361, 1367 (Alabama 1980) (Quoting from *Old Southern Life Insurance Company v. McConnell*, 52 Ala. App. 296, So.2d 183, 186 (1974)). The courts have further held the principal liable for his agent's fraud committed within the actual or apparent scope of his employment, even where the fraud was committed strictly for the agent's own benefit and to the principal's detriment. *Henderson v. Croom*, 403 F.Supp. 668 (1975). As stated in *National States Insurance Company v. Jones*, 393 So.2d 1361, (Ala. 1980), "while the soliciting agent commits fraud, the insurer's liability is vicarious and the principal is liable in spite of the fact that he did not participate in the fraud or even forbade it." *National States Insurance Company v. Jones*, 393 So.2d 1381 (Ala. 1980). *Gulf Electric v. Fried*, 218 Ala. 684, 119 So. 685.

As the above cases illustrate, the bulk of Alabama's law holds that a principal may be held liable in Respondent Superior for the fraud of its agents. The issue as to whether Ruffin was an agent for Pacific Mutual was properly given to the jury to decide, as was the abandonment of agency issue. (See discussion below.)

B. ABANDONMENT OF AGENCY

Pacific Mutual based its defense on an abandonment of agency theory. The defense argued that Lemmie Ruffin acted on behalf of other principals at the time he committed fraud, thereby abandoning his agency relationship with Pacific Mutual. The defense cited *Hearing Systems, Inc. v. Chandler*, 512 So.2d 84, (Ala. 1987), a hearing aid fraud case where one of the defendants was affiliated with Montgomery Hearing Health Services (MHHS), but was retained as a consultant for hearing systems (HS). In reversing a verdict of fraud, the Court held that defendant acted strictly as a consultant for HS and made no representations on behalf of MHHS. Further, the defendant did not receive any proceeds of the sale to plaintiff. *Hearing Systems, Inc. v. Chandler*, 512 So.2d at 88. This case differs from the case at bar, however, and such a verdict reversal is not warranted here.

As stated in *Brown v. Commercial Dispatch Publishing Co.*, 504 So.2d 245 (Ala. 1987), "whether one is an agent of another is ordinarily a question to be decided by jury." Also see *American Pioneer Life Insurance Company v. Sandlan*, 470 So.2d 657 (Alabama 1985). The Court further charged the jury regarding abandonment [sic] of agency. The Court clearly stated that "if, in fact, he had abandoned that relationship, the agency principal, the agent's relationship between Pacific Mutual and himself and it was reasonably apparent to everyone that

he was acting on behalf of another, that Pacific Mutual cannot be held responsible for his acts committed as an agent or within the line and scope of employment of someone else, another insurance agency." Trial excerpts 18-20. Having heard these instructions, the jury decided that Lemmie Ruffin had not abandoned his agency relationship with Pacific Mutual. The decision was not erroneous considering the evidence before them. The evidence showed that the plaintiffs believed that they were dealing with Pacific Mutual. For example, Mr. Ruffin presented the city with Pacific Mutual business cards, distributed Pacific Mutual brochures and schedule of benefits, and spoke as a Pacific Mutual representative. Mrs. Haslip was always under the impression that she was covered by Pacific Mutual, as were Alma Calhoun, Cynthia Craig, and Eddie Hargrove. Unlike the defendant in *Hearing Systems, Inc. v. Chandler*, Ruffin made a definite representations [sic] that he was an agent with Pacific Mutual.

C. FRAUD OF FUTURE ACTS

In its motion for JNOV, defendant alleges that there was an insufficiency of evidence of material misrepresentation of a presently existing fact to each of the plaintiffs. Where fraud is based upon a promise to perform in the future, two elements in addition to the fraud requirement, must be met: the defendant must have had no intention of doing the promised act when he made the alleged misrepresentation and he must have had an intent to deceive. *Coastal Concrete Co., Inc. v. Patterson*, 503 So.2d 824 (Ala. 1987). In the case at bar, however, the misrepresentation is of an existing fact. When an agent accepts the premium from a client, he is in essence telling the client that there is a presently existing policy. Thus, the agent is representing an

existing fact, not a future act. Courts have held that "payment of a premium is necessary as a condition precedent to an enforceable contract of insurance. *Johnson v. Dairyland Ins. Co.*, Ala. Civ. App. 398 So.2d 317, *Queen Insurance Co. of America v. Bethell Church*, 27 Ala. App. 443, 174 So. 638, cert denied, 234 Ala. 184, 174 So. 640 (1937). The premiums in this case were in fact paid out of the employee's paychecks and were not merely promises to pay. By accepting these premiums, the agent conveyed to the parties that their policies were both present and existing.

Even if this were to involve future acts, the evidence presented would prove that the agent had no intention of fulfilling his promises and that he intended this deception. By accepting premiums on a policy which, unbeknownst to the plaintiffs had been cancelled, the agent exhibited his intentions not to perform his promises.

D. ADMISSIBLE STATEMENTS OF WITNESSES

Deborah Ault was employed by Pacific Mutual in a secretarial capacity, her duties composed of answering the phone, receiving mail, typing for agents and Mr. Lupia and doing proposals. Evidence of her phone conversations with Ruffin's clients was admitted at trial and defendants contend this was inadmissible evidence of prejudicial effect. This evidence was admissible, however, not to prove truthfulness of the matter but to prove Pacific Mutual's notice of the problem. *Gamble, McElroy's Alabama Evidence* §273.02 (3rd Edition 1977), states that: if it is material to prove that a person at a specified time had been put on notice about a matter, or entertained a specified belief, acted in good or bad faith, had a specified motive to do or not to do an act with a specified motive . . . and which is offered for the

purpose of showing notice, belief, good or bad faith, motive or mental derangement is not violative of "the Hearsay Rule." *Pennsylvania Cas. Co. v. Perdue*, 164 Ala. 508. Ms. Ault's testimony was not admitted to prove Ruffin or Pacific Mutual's faults, but rather to show that Pacific Mutual had received notice of customer complaints.

Similarly, the testimony of both Frank Johnson and Lionel Williams was admissible to show a pattern in Mr. Ruffin's actions. On the issue of whether a party did a fraudulent act, proof may be made that such party committed similar fraudulent acts against other persons to show fraud, motive, scheme or intent. *Gamble, McElroy's Alabama Evidence*, §70.03 (1) (3rd Edition, 1977).

Both Johnson and Williams testified that each paid Mr. Ruffin for insurance policies which did not actually exist. This evidence simply illustrates a pattern of behavior Mr. Ruffin engaged in. This type of evidence was also admitted in a similar insurance fraud case. In *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657 (Ala. 1985), the court allowed the testimony of several witnesses who had been sold plans by the agent "to show that representations by an agent as to recovery of principal and accumulation of interest were false so as to prove a fraudulent scheme."

E. ACTUAL MONETARY DAMAGES ARE NOT NECESSARY IN ORDER TO RECOVER PUNITARY DAMAGES

One can recover punitive damages if the evidence proves that the misstatements were made with an intent to deceive or defraud. *Best Plant Food Products, Inc. v. Cagle*, 510 So.2d 229 (Ala. 1987), *Ex parte Lewis*, 416

So.2d 410 (Ala. 1982). Following *Curry Motor Co., Inc. v. Hasty*, 505 So.2d 347 (Ala. 1987), "punitive damages may be recovered in fraud action if fraudulent misrepresentation was malicious, oppressive or gross or made with knowledge of its falseness or so recklessly made as to amount to the same thing or is made with purpose of injuring plaintiff." *Curry Motor Co. Inc. v. Hasty*, 505 So.2d at 351; Code 1975, §6-5-101. The evidence presented in the present trial indeed established that Ruffin knowingly and intentionally committed fraud by collecting insurance premiums on cancelled policies and keeping the premiums for himself. Ruffin intentionally deceived not only Cleopatra Haslip, but also deceived Alma Calhoun, Cynthia Craig and Eddie Hargrove. All of the aforementioned names had premiums deducted from their payroll for five months and only received coverage for one month — the fraud intentionally committed by Ruffin. This element of intent is an important element which entitles the plaintiffs to punitive damages.

Punitive awards are also allowable even where only nominal damages are incurred in fraud cases. However, courts stress the intentional nature of the fraud and have allowed large punitive damage awards where there was evidence of "intentional, gross and oppressive" fraud. *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657 (Ala. 1985) at 669. So long as the verdict was not so excessive as to be considered the result of a jury with "bias, passion, prejudice or some other improper motive, a very large punitive damage award is not considered excessive, especially when paired with strong evidence of intentional fraud. *Aetna life ins. co. [sic] v. Lavoie*, 470 So.2d 1060 (Ala. 1985) at 1076.

F. JURY CHARGES

In charging the jury on the issue of fraud, the court concedes that it erred in not distinguishing between legal intent (a negligence standard where punitive damages are not recoverable) and fraudulent intent (knows it is untrue when he makes the representation.) It has been a practice of the undersigned to instruct the jury without notes in a conversational manner, rather than reading verbatim from approved charges. Perhaps the phrase "should have known" inadvertently crept into the oral charge because of this practice, for the undersigned is at a loss to understand why the phrase was included. Although the "should have known" language should not have been included, it is unlikely that this misleading language materially confused the jury. Taken together with the evidence, it is the opinion of this court, that the misphrased jury instruction was not of sufficient scale to substantially harm the defendant. Rule 61, *Alabama Rules of Civil Procedure*, *Wilk v. American Medical Association*, 719 F.2d 207 (7th Cir. 1983), *Alabama Farm Bureau Mutual Cas. Ins. Co., Inc. v. Smelley*, 295 Ala. 346, 329 So.2d 54 (1976), *Maslowski v. Beam*, 288 Ala. 254, 259 So.2d 804 (1972).

In light of the above, it is important to stress that Pacific Mutual did not base its defense of this case on whether Lemmie Ruffin committed fraud. Rather, Pacific Mutual focused on an abandonment of agency theory. Pacific Mutual did not defend Ruffin. In fact, Ruffin, a named defendant, did not even show up at trial. Pacific Mutual simply defended its case by attempting to show that Ruffin had abandoned his agency relationship with Pacific Mutual. Again, the court stresses Pacific Mutual did not defend Ruffin on his fraudulent acts. Further, all evidence pointed to the conclusion that Ruffin committed fraud, with malice aforethought.

Ruffin had the cancellation notices sent to him from California, the premiums were still being collected after its cancellation of its policy and Roosevelt City did no [sic] know that the policies were cancelled. The conclusion is inescapable that the fraud was intentional, gross, oppressive and malicious.

In consideration of these facts, the jury was not erroneous in finding fraud, the elements of which include: "false representation of a material fact relied upon by a party who is damaged as a proximate result of alleged misrepresentation; [and] if fraud is based upon a promise to perform or abstain from some act in future . . . defendant's intention at time of alleged misrepresentation not to do act promised, coupled with intent to deceive." *Coastal Concrete Co. v. Patterson*, 503 So.2d 824 (Ala. 1987), *Smith v. First Bank of Childersburg*, 501 So.2d 1228. (Ala. Civ. App. 1987). Further, plaintiff may prove defendant's intent to deceive through "circumstantial evidence relating to events occurring after representation was made." *Super Value Stores, Inc. v. Peterson*, 506 So.2d 317 (Ala. 1987).

G. MOTION FOR REMITTITUR

In *Hammond v. The City of Gadsden*, 493 So.2d 1394, the Supreme Court made it incumbent upon the trial judge to spread upon the record his reasons for granting or refusing a remittitur of jury verdicts. The Court cited certain factors to be taken into consideration by the trial court in granting or refusing the remittitur.

As has been stated throughout this Order, it is the opinion of this Court that the conduct in this case evidenced intentional malicious, gross, or oppressive fraud. In addition to the acts of Mr. Ruffin, the testimony draws an inference that Mr. Patrick Lupia, Manager of the local Pacific Mutual office, had notice of past

problems with Mr. Ruffin including, but not limited to, prior acts of fraud, and that he participated in the decision to have the cancellation notice sent to the Pacific Mutual agency rather than to the insured. It goes without saying that it is highly desirable to discourage others, similarly situated from similar conduct.

Although the award is for a great amount of money, it is the considered opinion of this Court that it is not excessive as a matter of law, though this Court would in all likelihood have rendered a lesser amount; nor is the verdict based upon bias, passion, corruption, or other improper motive. The jury seems to fashioned [sic] their awards in proportion to the damage done each plaintiff; awarding the most damaged plaintiff, Cleopatra Haslip, the larger award and the least damaged plaintiff, Eddie Hargrove, the least award.

The jury was composed of male and female, white and black and in the opinion of the Court, acted conscientiously throughout the trial.

This Court has heard policy arguments against enriching a particular plaintiff under the guise of punishing a defendant from wrongful conduct. It has been suggested by some that punitive damage awards should not be paid to the plaintiff as competent compensation. This Court will leave to others the resolution of this argument, as it is the present law that punitive damages are payable to the particular wronged plaintiff. Though this result might well be different under the recently enacted law, this Court deems it imperative to follow the law as it existed when the wrong was committed.

As stated in *Hammond*, supra: "We begin by recognizing that the right to a trial by jury is a fundamental, constitutionally guaranteed right, Art. I, § 11, Const. [sic] of 1901, and therefore, that a jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection. It is only in those cases that a

trial court, pursuant to A.R.Civ.P. 59(f), and this Court, pursuant to Code 1975, § 12-22-71, may interfere with a jury verdict."

As has previously been stated, this Court is not of the opinion that the jury verdict is flawed to the point that it should be disturbed and set aside by this Court.

DONE and ORDERED, this 11 day of December, 1987.

/s/ Charles R. Crowder
Charles R. Crowder, Circuit Judge

APPENDIX B

RELEASED SEP 15 1989
Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1989

87-482 Pacific Mutual Life Insurance Company
v.
Cleopatra Haslip, et al.
Appeal from Jefferson Circuit Court
(CV-82-2453)

SHORES, JUSTICE.

The defendant, Pacific Mutual Life Insurance Company (hereinafter "Pacific Mutual"), appeals from judgments, entered after a jury trial, in favor of the plaintiffs, Cleopatra Haslip, Cynthia Craig, Alma Calhoun, and Eddie Hargrove.

All four plaintiffs are employees of Roosevelt City (hereinafter the "City"), a small incorporated community in western Jefferson County. As many small communities do, Roosevelt City allowed its employees to purchase a group health insurance policy through the municipality. Originally that policy was issued by Blue Cross-Blue Shield. Some months prior to 1981, however, Blue Cross cancelled the policy when several City employees dropped out of the plan, reducing the number of eligible employees participating in the plan below the minimum number of participants required by Blue Cross to maintain a group policy.

Lemmie Ruffin was a soliciting agent for Pacific Mutual. Ruffin sent a mail solicitation to the City asking if it was interested in discussing insurance. The City returned a card indicating that it was.

Ruffin first met with the mayor of the City, who gave him permission to solicit business from the City's employees. Before approaching the employees, Ruffin sought information about the employees from the city clerk, Mabel Poindexter. As he was later to do with the plaintiffs, Ruffin approached Mrs. Poindexter, telling her that he was "with Pacific Mutual." He handed her a Pacific Mutual business card, and he explained that he had been told that the City employees needed hospital coverage. Testimony indicates that Ruffin never told Mrs. Poindexter or the plaintiffs that Pacific Mutual would not write health insurance.

In truth, while Pacific Mutual would issue individual life policies, it did not write group health policies for municipalities. Pacific Mutual did, however, allow its agents to broker business with other insurance companies, and Ruffin was a licensed agent of Union Fidelity Life Insurance Company (hereinafter "Union Fidelity"), which did issue group health insurance through municipalities. Accordingly, Ruffin submitted a proposal to the City on a Pacific Mutual letterhead; that proposal indicated that he would place life insurance with Pacific Mutual and health insurance with Union Fidelity. While Union Fidelity and Pacific Mutual are separate and distinct companies and have no affiliation, Ruffin, when asked by Mrs. Poindexter, indicated that Union Fidelity was a subsidiary of Pacific Mutual.

Employees who opted to participate in the insurance plan paid their premiums by way of payroll deduction. Periodically, Mrs. Poindexter collected the money deducted from these employees' paychecks and wrote one check each month to cover the insurance premiums. These checks were sent to, or were picked up by, Ruffin, who prepared the billing each month on a Pacific Mutual letterhead. Within a few months of the effective date of the insurance policies, they were cancelled for

nonpayment of premiums. Neither the City nor its employees were made aware that the policies had lapsed, because unknown to the City, Mr. Ruffin, with the help of Pacific Mutual's Birmingham manager, Patrick Lupia, had had all correspondence between the insurers and the City employees funnelled through Lupia's Birmingham Pacific Mutual office. In effect, the employees had been paying Ruffin, but their payments had not been forwarded to the insurers.

During this time, in January 1982, Cleopatra Haslip, a participating member of the health insurance plan, entered a hospital. After incurring \$2,500 in hospital bills and additional medical bills, she learned that her insurance had been cancelled. The hospital demanded \$600 before it would agree to discharge her, and her doctor eventually turned her case over to a collection agency. In time, a deficiency judgment was rendered against Mrs. Haslip, and, as a result, her credit was adversely affected.

Mrs. Haslip and other members of the insurance plan sued Pacific Mutual and Lemmie Ruffin. The case was submitted to the jury on the plaintiffs' claim of fraud; on August 7, 1987, the jury rendered a verdict in favor of each of the plaintiffs in the following amounts: Cleopatra Haslip — \$1,040,000; Cynthia Craig — \$12,400; Alma Calhoun — \$15,290; Eddie Hargrove — \$10,288.

Pacific Mutual timely filed motions for a new trial, or alternatively, a judgment notwithstanding the verdict. The motions were denied by the trial court. Pacific Mutual appeals from the judgment based on the verdict; Lemmie Ruffin has not appealed.

Pacific Mutual raises eleven issues on appeal. To facilitate our discussion, we address in the first section several interrelated issues raised by Pacific Mutual.

I.

The first issue that Pacific Mutual presents is whether the trial court erred in charging the jury. Pacific Mutual suggests three ways in which it says the jury charge was flawed: that the trial court charged the jury on an incorrect standard for awarding punitive damages for fraud; that the trial court improperly charged the jury on the standard for awarding damages for mental distress for fraud; and that the trial court erred in refusing to give Pacific Mutual's requested charge regarding justifiable reliance. We address each of these alleged errors in turn.

In charging the jury, the trial judge indicated that the jury could impose liability for fraud if it determined that defendant Ruffin knew that his representations to the plaintiffs were false or *should have known* that his representations were false:

"[The Court:] The defendant must have known at the time he made the representation that that fact was not true or he *should have known* that it was not true.

"....

"That is the Defendant represents a certain fact to be true, when in fact that fact is untrue. The Defendant making that representation knows it is untrue when he makes the representation or he *should have known* it was untrue." (Emphasis added.)

The latter phrase, "should have known it was untrue," Pacific Mutual contends, suggests negligence, which constitutes only "legal fraud": a misrepresentation made innocently or by mistake, for which punitive damages are not recoverable. Code 1975, § 6-5-101. *Continental Volkswagen, Inc. v. Soutullo*, 54 Ala. App. 410, 309 So.

2d 119 (1975). In contrast, a cause of action for deceit or willful fraud, for which punitive damages are recoverable, requires proof that the defendant knew his representation was untrue at the time he made that representation or that he made the representation with reckless disregard for the truth. Code 1975, § 6-5-103. Because punitive damages are not recoverable for "legal fraud," Pacific Mutual argues that the failure of the trial court to distinguish in its jury charge between willful fraud and legal fraud impermissibly allowed the jury to impose punitive damages for mere legal fraud. We disagree.

In his written opinion, the trial judge conceded that he had erred in charging the jury on the issue of fraud by not distinguishing between misrepresentation and fraud. Moreover, the trial court admitted that the phrase "should have known" had crept into the charges inadvertently. Nevertheless, we can not say that under the facts of this case the misphrased jury instruction substantially harmed the defendant.

The evidence submitted at trial indicated that Lemmie Ruffin forged signatures on applications in order to obtain a minimum number of applicants to meet Union Fidelity's membership requirements for establishing a group insurance plan; that the plan was cancelled within a few months of its inception for nonpayment of premiums, even though participants in the plan had made their premium payments to Lemmie Ruffin; that Lemmie Ruffin continued to accept premium payments after notice of cancellation of the insurance plan had been received by his office; that premium payments collected by Lemmie Ruffin were deposited into his own account; and that Ruffin deposited funds refunded to participants by Union Fidelity into his wife's personal savings account. Given these facts, it is impossible for this Court to entertain the suggestion that the jury could

have been confused or that it could have concluded that Ruffin's representations were made either innocently or mistakenly. We, therefore, affirm the trial court's conclusion that if, in the context of these facts, the charge was erroneous, then the erroneous charge can only be characterized as harmless error. As the trial judge stated his opinion:

"Although the 'should have known' language should not have been included, it is unlikely that this misleading language materially confused the jury. Taken together with the evidence, it is the opinion of this court that the misphrased jury instruction was not of sufficient scale to substantially harm the defendant. [Citations omitted.]

"....

"[Given these facts,] [t]he conclusion is inescapable that the fraud was intentional, gross, oppressive and malicious."

Next, Pacific Mutual argues that the trial court erred in charging the jury on awarding damages for mental distress for fraud. Again, damages for mental distress may not be awarded unless the fraud was willful. *Holcombe v. Whitaker*, 294 Ala. 430, 318 So. 2d 289 (1975). As we have previously stated, when one considers the evidence presented at trial, he can reach but one reasonable conclusion: if fraud existed in this case, that fraud must have been willful. Thus, we will not reverse the judgment case based upon the trial court's failure to distinguish willful from nonwillful fraud.

The third alleged error in the instructions to the jury was the judge's refusal to give a charge regarding justifiable reliance. After careful scrutiny of the record, and in particular the trial judge's charge to the jury, we

find no basis upon which we may reverse the judgment in this case because of the judge's refusal of this charge.

II.

The next issue Pacific Mutual presents is whether the trial court erred in failing to grant its motions for directed verdict and judgment notwithstanding the verdict. Pacific Mutual argues that these motions were due to be granted because, it says, 1) Ruffin was not acting within the scope of his agency with Pacific Mutual in placing or maintaining health insurance on the City employees, 2) Ruffin's acts are not imputable to Pacific Mutual, and 3) the evidence presented at trial failed to prove the elements of an action for misrepresentation on the part of Pacific Mutual. We disagree with all three of Pacific Mutual's arguments.

Because the trial court accurately addresses the state of the law regarding the doctrine of respondeat superior in Alabama, we quote at length from the trial judge's opinion:

"The Supreme Court of Alabama has repeatedly stated that a corporation is liable for the torts of its employees, both agent, and servant, based upon the principle of respondeat superior, not the doctrine of agency. 'The factual question to be determined is whether the act complained of was done either by agent or servant while acting within the course and scope of his employment; the corporation or principal may be liable in tort for the acts of its servants or agents done within the scope of employment, real or apparent, even though it did not authorize or ratify such acts or even expressly forbade them.' *Autry v. Blue Cross & Blue Shield of Alabama*, 481 So. 2d 345,

347-48 (Ala. 1985), *National States Ins. Co. v. Jones*, 392 So. 2d 1361, 1367 (Ala. 1980) (quoting from *Old Southern Life Ins. Co. v. McConnell*, 52 Ala. App. 589, 296 So. 2d 183, 186 (1974)). The courts have further held the principal liable for this agent's fraud committed within the actual or apparent scope of his employment, even where the fraud was committed strictly for the agent's own benefit and to the principal's detriment. *Henderson v. Croom*, 403 F. Supp. 668 (1975). . . .

"As the above cases illustrate, the bulk of Alabama's law holds that a principal may be held liable in respondeat superior for the fraud of its agents. The issue as to whether Ruffin was an agent for Pacific Mutual was properly given to the jury to decide, as was the abandonment-of-agency issue."

Pacific Mutual primarily based its defense of this case on an "abandonment of agency" theory. The defense argued that Ruffin was acting on behalf of other principals at the time he committed fraud, thereby abandoning his agency relationship with Pacific Mutual.

As the trial court pointed out above, whether one is an agent of another is generally a question to be decided by the jury. *Brown v. Commercial Dispatch Pub. Co.*, 504 So. 2d 245, 246 (Ala. 1987). Accord, *American Pioneer Life Ins. Co. v. Sandlin*, 470 So. 2d 657 (Ala. 1985). In *American Pioneer*, the agent, McWhorter, was not a registered agent for American Pioneer when he sold an annuity to the plaintiff, although he became one several months later. Because the evidence pertaining to McWhorter's status as an agent of American Pioneer was conflicting, this Court deemed it a proper question for the jury.

In this case there is no question that sufficient evidence existed to support the jury's determination that Lemmie Ruffin and his agency manager, Patrick Lupia, were acting within the line and scope of their employment with Pacific Mutual when Ruffin made the representations to the plaintiffs that became the subject of this suit: Ruffin was a Pacific Mutual agent and an employee of the company; Lupia was the agency manager; Ruffin's licensing was maintained by the Pacific Mutual office; Ruffin was furnished training and sales material by Pacific Mutual; Ruffin always introduced himself as "Lemmie Ruffin with Pacific Mutual"; Ruffin's reply card was mailed from, and was returned to, the Pacific Mutual office; Ruffin presented City employees with his Pacific Mutual business card; Ruffin never told anyone that the health insurance would be placed with a company other than Pacific Mutual; Ruffin's proposal was typed at Pacific Mutual's office on Pacific Mutual stationery; the monthly billing statements for premiums were prepared at, and mailed from, Pacific Mutual office on Pacific Mutual stationery; Lupia handled all the finances and "the books" for the Pacific Mutual office; all of Lupia's business and all of Ruffin's business was carried on at Pacific Mutual offices; Lupia had received complaints from policy-holders alleging that Ruffin was engaging in fraudulent activities but he had done nothing about those complaints; Pacific Mutual's home office had received complaints regarding Ruffin's fraudulent activities but had done nothing about them.

This evidence was properly submitted to the jury, which found that Lemmie Ruffin had not abandoned his agency relationship with Pacific Mutual, and that he had not acted alone. The jury rendered a verdict based upon sufficient evidence. For the foregoing reasons, we can not find that Ruffin was acting outside the scope of his

agency or that his acts were not imputable to Pacific Mutual.

Moreover, we can not say, given the evidence submitted to the jury, that the plaintiffs failed to prove the elements of an action for misrepresentation. Pacific Mutual claims that the plaintiffs failed to adduce evidence supporting a claim for fraud because, it says, there was no misrepresentation of a material existing fact, no justifiable reliance upon any misrepresentations, and no actual damage to the plaintiffs. This statement simply ignores the evidence presented at trial. When Lemmie Ruffin accepted the premium payments from his clients, the plaintiffs, he was in essence telling those clients that there was an existing policy in effect. Thus, Ruffin was misrepresenting an existing fact. Courts have held that "payment of a premium is necessary as a condition precedent to an enforceable contract of insurance." *Johnson v. Dairyland Ins. Co.*, 398 So. 2d 317 (Ala. Civ. App. 1981), *Queen Ins. Co. of America v. Bethell Chapel*, 27 Ala. App. 443, 174 So. 638, cert. denied, 234 Ala. 184, 174 So. 640 (1937). The premiums in this case were in fact paid out of the employees' paychecks and were not merely promises to pay. By accepting these premiums, Ruffin represented to the parties that their policies were both existing and current. The evidence presented proves that Ruffin had no intention of fulfilling his promises and that he intended his deception. By accepting premiums on a policy which, unknown to the plaintiffs, had been cancelled, Ruffin exhibited his intentions not to perform his promises. We therefore reject Pacific Mutual's claim that the evidence did not prove the elements of an action for fraud.

III.

Pacific Mutual next argues that the trial was tainted by the admission of illegal evidence. At trial, the testimony of a number of witnesses was admitted despite the objections of Pacific Mutual. First, the testimony of Debra [sic] Ault, a former secretary, regarding telephone calls from unnamed persons complaining about Ruffin, was admitted over objection that the proper foundation had not been laid for the testimony. Pacific Mutual argues that this evidence was prejudicial, because it was offered as evidence of other frauds perpetrated by Lemmie Ruffin. Moreover, Ault's testimony, Pacific Mutual claims, was improper because, although the rule had been invoked, Ault was allowed to remain in the courtroom during other witnesses' testimony.

C. Gamble, *McElroy's Alabama Evidence* § 273.02 (3d ed. 1977) states:

"If it is material to prove that a person at a specified time had been put on notice about a matter . . . proof that a statement was made to him prior to the time in question . . . and which is offered for the purpose of showing . . . notice, . . . is not violative of the Hearsay Rule."

Pacific Mutual employed Ault as a secretary. Her duties consisted of, among other things, answering the telephone. The trial court admitted evidence of her conversations with Ruffin's clients, not to prove the truthfulness of the matter asserted, but rather to prove Pacific Mutual's notice of the fraud. Lupia denied any such complaints. Ault's testimony showed that Pacific Mutual had received notice of customer complaints concerning Ruffin; therefore, the trial court's admission

of Ault's testimony did not improperly prejudice the trial.

Pacific Mutual also complains of the trial court's admission of the testimony of Cleopatra Haslip, one of the plaintiffs; that of Ralph Passman, an insurance broker who handled the Union Fidelity insurance plan and who maintained records concerning the cancellation of that policy; and that of Ron Gaiser, an expert witness for the plaintiffs. After a careful review of the trial court's rulings in regard to each, we can not say that Pacific Mutual was materially prejudiced by the admission of this evidence.

IV.

Finally, Pacific Mutual argues that the punitive damages award in this case violates its rights embodied in the first, fourth, fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

Initially we point out that the United States Supreme Court has recently ruled in the case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989), that the excessive fines clause of the eighth amendment does not apply to punitive damages awards in cases between private parties. Moreover, in a series of recent cases, this Court has rejected the remaining constitutional arguments submitted by Pacific Mutual. See, *Industrial Chemical & Fiberglass Corp. v. Chandler*, [Ms. 86-381, Ms., 86-385, Sept. 30, 1968, after remand, June 16, 1989] ___ So. 2d ___ (Ala. 1988); *United American Ins. Co. v. Brumley*, 542 So. 2d 1231 (Ala. 1989); *HealthAmerica v. Menton*, [Ms. 87-1100, July 21] ___ So. 2d ___ (Ala. 1989); *Olympia Spa v. Johnson*, [Ms. 87-110, May 12, 1989] ___ So. 2d ___ (Ala. 1989).

We also note that, in an abundance of concern for the preservation and protection of a defendant's constitutional right to due process of law, this Court has adopted guidelines to be used by the trial court in reviewing judgments. These guidelines are found in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Harmon v. Motors Insurance Corp.*, 493 So. 2d 1370 (Ala. 1986); *Alabama Farm Bureau Mutual Cas. Ins. Co. v. Griffin*, 493 So. 2d 1379 (Ala. 1986). They require the trial judge to reflect on the record his or her reasons for either interfering or not interfering with a jury's verdict.

In reviewing the punitive damages award in this case, the trial judge applied the principles of law adopted in these cases, held a hearing, and set out on the record the reasons why he felt the law did not authorize him to order a remittitur. The facts in the record support the trial court's findings. Further, jury verdicts are presumed correct, and that presumption is strengthened when the presiding judge refuses to grant a new trial. *Super Valu Stores, Inc. v. Peterson*, 506 So. 2d 317 (Ala. 1987). In view of the record, we conclude that the judgment of the trial court, including the damages award, which the trial court reviewed on motion for new trial, is due to be, and it hereby is, affirmed.

AFFIRMED.

Jones, Almon, Adams, and Kennedy, J.J., concur.

Houston, J. concurs in the result.

Maddox and Steagall, J.J., concur in part and dissent in part.

87-482

Pacific Mutual Life Ins. Co. v. Cleopatra Haslip, et al.
MADDOX, JUSTICE (concurring, in part; dissenting, in part).

I concur in the majority opinion in all respects except as to that aspect of the opinion that holds that the punitive damages award in this case does not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

While I personally agree with Justice O'Connor that the "excessive fines clause" of the Eighth Amendment should be applicable in civil cases,¹ I recognize that the Supreme Court of the United States, in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989), has held otherwise. I think that the United States Supreme Court, in *Kelco*, while holding that the excessive fines clause of the Eighth Amendment is inapplicable to a punitive damages award in a civil case,² nevertheless left the door open for a challenge under the federal constitution's due process clause. In fact, in *Kelco*, all nine Justices expressed some concern with unrestrained punitive damages awards, and as I read *Kelco*, the Court may consider a challenge to an award that is properly presented and argued under the due process clause of the Fourteenth

¹ See my dissenting opinion in *Industrial Chemical & Fiberglass Corp. v. Chandler*, [Ms. 86-381 & 86-385, September 30, 1988, after remand, January 16, 1989] ___ So. 2d ___ (Ala. 1988).

² The Court's majority opinion, written by Justice Blackmun, said that the Eighth Amendment's excessive fines clause did not apply to punitive damages awards in civil suits between private parties, because "the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages." ___ U.S. at ___, 109 S.Ct. at 2915.

Amendment.³

During the last few years, individual Justices of the Supreme Court of the United States have expressed concern about "windfall recoveries which may be both unpredictable and, at times, substantial";⁴ "juries [that] assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused";⁵ and awards based upon a jury's "wholly standardless discretion to determine the severity of punishment."⁶

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), a case which was appealed from this Court, the Court noted that the argument "that the lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause of the Fourteenth Amendment" raised important issues that "in

³ In *Kelco*, the Court found that the due process issue had not been sufficiently raised for the Court to consider it, but the Court did not: "[W]e have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. . . . That inquiry must await another day." ___ U.S. at ___, 109 S.Ct. at 2921. Justice Blackmun stated: "There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award." *id.*

In *Kelco*, in a separate concurring opinion in which Justice Marshall joined, Justice Brennan suggested that the due process issue could be raised: "I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." ___ U.S. at ___, 109 S.Ct. at 2923.

⁴ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981).

⁵ *Gertz v. Welch*, 418 U.S. 323, 350 (1974).

⁶ *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, ___, 108 S.Ct. 1645, 1656 (1988) (O'Connor, J., concurring in part and concurring in the judgment).

an appropriate setting, must be resolved.” 475 U.S. at 837.

While the view I expressed in my dissent in *Industrial Chemical & Fiberglass Corp.* was not sustained in *Kelco*, I take heart that ultimately, when the due process issue is properly presented to the United States Supreme Court, that Court will hold that giving a jury a “standardless discretion” to award punitive damages in a civil case violates the due process clause of the Fourteenth Amendment.

While I applaud the procedure this Court has adopted to review and revise the jury’s decision based on its “standardless discretion,”⁷ I cannot believe that procedure is sufficient to accord to litigants all the due process protection the Constitution envisions.⁸

Because I believe that the award of punitive damages in this case violates the defendant’s due process rights under the Fourteenth Amendment, I must respectfully dissent as to that portion of the majority’s opinion.

Steagall, J., concurs.

⁷ *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Harmon v. Motors Ins. Corp.*, 493 So. 2d 1370 (Ala. 1986); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Griffin*, 493 So. 2d 1379 (Ala. 1986).

⁸ In various special concurrences and dissents, I have expressed the view that punitive damages awarded in wrongful death cases are in a different category from punitive damages awarded in other cases. See *Alabama Power Co. v. Cantrell*, 507 So. 2d 1295, 1306 (Ala. 1986), appeal dismissed, ___ U.S. ___, 108 S.Ct. 2008 (1988); *Industrial Chemical*, *supra*.

The Legislature, in placing a “cap” on the award of punitive damages in all cases other than wrongful death cases (except, of course, the \$1,000,000 cap in the Medical Liability Act) has essentially recognized the distinction that I have made and do make.

APPENDIX C

- C 1 -

MAILING ADDRESS:
P.O. BOX 157
MONTGOMERY, ALABAMA 36101
TELEPHONE: 261-4609

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 87-482

Pacific Mutual Life Insurance Company
Appellant
vs.
Cleopatra Haslip, et al.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

- _____ Appeal docketed. Future correspondence should refer to the above number.
- _____ Court Reporter granted additional time to file reporter's transcript to and including
- _____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
- _____ Appell granted 7 additional days to file briefs to and including
- _____ Appellant(s) granted 7 additional days to file reply briefs to and including
- _____ Record on Appeal filed

_____ Appendix Filed
_____ Submitted on Briefs
_____ Petition for Writ of Certiorari denied. No
_____ opinion.
XXXX Application for rehearing overruled. No
_____ opinion written on rehearing.
_____ Permission to file amicus curiae briefs granted

11/9/89

bsa

/s/ Robert G. Esdale
Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX D

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
DECEMBER 6, 1989

87-482
Pacific Mutual Life Insurance Company
v.
Cleopatra Haslip, et al.

Jefferson County Circuit Court
CV-82-2453

ORDER

The application for stay of judgment pending petition for writ of certiorari to the United States Supreme Court having been filed and duly submitted to the Court,

IT IS ORDERED that the application for stay of judgment pending petition for writ of certiorari to the United States Supreme Court is denied.

Hornsby, C.J., and Maddox, Jones, Almon, Shores, Adams, Houston, Steagall, and Kennedy, J.J., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 6th day of Dec. 1989.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-452

Pacific Mutual Life Insurance Company,
Applicant,

v.

Cleopatra Haslip, et al.

ORDER

UPON CONSIDERATION of the application for stay and the response filed thereto,

IT IS ORDERED that execution of the judgment of the Supreme Court of Alabama in the above-entitled matter, case No. 87-482, filed September 15, 1989, be and the same is hereby stayed pending referral of the application to the Court for consideration at the Conference on Friday, January 5, 1990.

This order is further conditioned upon the supersedeas bond currently posted with the Circuit Court of Alabama, Jefferson County, Civil Action No. CV 82 2453, remaining in effect.

IT IS FURTHER ORDERED that this stay shall continue pending further order of the Court or of the undersigned.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 22nd day of December, 1989.

A true copy JOSEPH F. SPANIOL, JR.

Tests

Clerk of the Supreme Court of the United States

By /s/ Francis J. Corsan
Chief Deputy

- E 2 -

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543**

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

January 8, 1990

Mr. Bruce A. Beckman
Adams, Duque & Hazeltine
523 West Sixth Street
Los Angeles, CA 90014

RE: Pacific Mutual Life Insurance Company
v. Cleopatra Haslip, et al.
No. A-452

Dear Mr. Beckman:

The Court today entered the following order in the above-entitled case:

"The application for stay presented to Justice Kennedy and by him referred to the Court is granted and it is ordered that execution and enforcement of the judgment of the Supreme Court of Alabama, case No. 87-482, is stayed pending the timely filing and disposition of a petition for a writ of certiorari. In the event the petition for a writ of certiorari is denied, this order terminates automatically. Should the petition for a writ of certiorari be granted, this order is to remain in effect pending the issuance of the mandate of this Court. This order is further conditioned upon the supersedeas bond presently posted with the Clerk of the Circuit

- E 3 -

Court of Jefferson County, Alabama, Civil Action
No. CV 82 2453, remaining in effect."

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By /s/ Francis J. Lorson

Francis J. Lorson
Chief Deputy Clerk

ed

cc: Bruce J. Ennis
Clerk, Supreme Court of Alabama
(Your No. 87-482)
Clerk, Circuit Court of Alabama,
Jefferson County (Your No. CV 82 2453)

Supreme Court, U.S.
FILED

MAR 9 1990

JOSEPH F. SPANIOLO, JR.
CLERK

No. 89-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,
Respondents.

—
On Petition for Writ of Certiorari
to the Supreme Court of Alabama

—
RESPONDENTS' BRIEF IN OPPOSITION
—

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

ROBERT H. ADAMS
NAJJAR, DANABERG, MEYERSON,
MAX, WRIGHT & SCHWARTZ, P.C.
2125 Morris Avenue
Birmingham, Alabama 35203
(205) 328-5760

March 9, 1990

BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
CYNTHIA MISICKA
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400

CHARLES E. SHARP
JOHN F. WHITAKER
SADLER, SULLIVAN, HERRING
& SHARP, P.C.
2500 Southtrust Tower
Birmingham, Alabama 35203
(205) 326-4166

Attorneys for Respondents

* Counsel of Record

QUESTIONS PRESENTED

1. Whether this Court should review due process challenges to a state court punitive damages award in a case in which the factual record does not indicate what portion of that award, if any, constituted punitive damages.

2. Whether this Court should review a due process challenge to the "vicarious" imposition of punitive damages in a case in which the factual record demonstrates that petitioner had full knowledge of, and participated in, the fraud perpetrated by its agent.

3. Whether this Court should review a due process challenge to the imposition of punitive damages when the law pursuant to which damages were awarded has been supplanted by legislation and is unique among the States in any event.

4. Whether this Court should review a due process challenge to "unbridled jury discretion" to award punitive damages in a case in which the discretion of the jury awarding damages was guided and confined by substantive limitations and procedural safeguards against arbitrariness.

5. Whether fundamental principles of judicial restraint and federalism should lead this Court to decline to constitutionalize the law of punitive damages in light of the complexity of the issues involved and widespread legislative initiatives in this area.

6. Whether petitioner's remaining due process and equal protection challenges to the damages award in this case raise any unresolved federal question of substantial importance.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. The Fraud Perpetrated Against Respondents....	1
B. Pacific Mutual's Role in the Fraud	4
C. The Jury Verdict	6
D. Review by the Alabama Courts	7
REASONS FOR DENYING THE WRIT	8
I. THE FACTS OF THIS CASE DO NOT PRE- SENT AN APPROPRIATE SETTING FOR REVIEWING THE CONSTITUTIONAL IS- SUES RAISED IN THE PETITION	8
II. PLENARY REVIEW WILL NOT RESULT IN THE ESTABLISHMENT OF PRINCIPLES OF CONSTITUTIONAL LAW APPLICABLE BEYOND THIS CASE BECAUSE THE LEGAL STANDARDS AT ISSUE WERE UNIQUE TO ALABAMA AND HAVE BEEN SUPERSEDED BY LEGISLATIVE ENACT- MENT	10
III. THE LEGAL STANDARDS GOVERNING THE AWARD OF PUNITIVE DAMAGES IN THIS CASE DO NOT PRESENT ANY OF THE POTENTIAL CONSTITUTIONAL IN- FIRMITIES IDENTIFIED BY MEMBERS OF THIS COURT	14
IV. RESPECT FOR ONGOING STATE REFORM EFFORTS AND RECENT EVIDENCE ABOUT THE ACTUAL IMPACT OF PUNI- TIVE DAMAGES CAST DOUBT ON THE WISDOM OF CONSTITUTIONALIZING PRO- CEDURAL REQUIREMENTS FOR PUNI- TIVE DAMAGES AWARDS	17

TABLE OF CONTENTS—Continued

V. PACIFIC MUTUAL'S REMAINING CHALLENGES TO THE PUNITIVE DAMAGES AWARD IN THIS CASE RAISE NO IMPORTANT FEDERAL QUESTION	Page 22
CONCLUSION	27

TABLE OF AUTHORITIES

CASES:	Page
<i>Aetna Life Insurance Co. v. Lavoie</i> , 475 U.S. 813 (1986)	14, 16, 19, 21
<i>Aetna Life Insurance Co. v. Lavoie</i> , 505 So. 2d 1050 (Ala. 1987)	10
<i>American Society of Mechanical Engineers v. Hydrolevel Corp.</i> , 456 U.S. 556 (1982)	23
<i>Bankers Life and Casualty Co. v. Crenshaw</i> , 486 U.S. 71, 108 S. Ct. 1645 (1988)	9, 13, 19, 21
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	7
<i>Boott Mills v. Boston & M.R.R.</i> , 218 Mass. 582, 106 N.E. 680 (1914)	20
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986)	23
<i>Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989)	14, 21, 24, 25
<i>Central Alabama Electric Cooperative v. Tapley</i> , 546 So. 2d 371 (Ala. 1989)	12
<i>City of Lowell v. Massachusetts Bonding & Insurance Co.</i> , 313 Mass. 257, 47 N.E.2d 265 (1943)	20
<i>Combined Insurance Co. v. Ainsworth</i> , 763 P.2d 673 (Nev.), cert. denied, 110 S. Ct. 276 (Nov. 6, 1989)	14
<i>Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.</i> , 234 Cal. Rptr. 835 (Cal. App. 1987), cert. denied, 436 U.S. 1036 (1988)	24
<i>Green Oil Co. v. Hornsby</i> , 539 So. 2d 218 (Ala. 1989)	12, 16
<i>Hammond v. City of Gadsden</i> , 493 So. 2d 1374 (Ala. 1986)	passim
<i>Hansen v. Johns-Manville Products Corporation</i> , 734 F.2d 1036, 1042 (5th Cir. 1984), cert. denied, 470 U.S. 1051 (1985)	24
<i>Hawkins v. Allstate Ins. Co.</i> , 733 P.2d 1073 (Ariz.), cert. denied, 484 U.S. 874 (1987)	24
<i>In re Winship</i> , 397 U.S. 358 (1970)	26
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144 (1963)	25
<i>Lake Shore & M.S.R. Co. v. Prentice</i> , 147 U.S. 101 (1893)	23

TABLE OF AUTHORITIES—Continued

	Page
<i>Layne & Bowler Corp. v. Western Well Works, Inc.</i> , 261 U.S. 387 (1923)	13
<i>Linthicum v. Nationwide Life Insurance Co.</i> , 150 Ariz. 326, 723 P.2d 675 (1986)	20
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	16-17
<i>Louis Pizitz Dry Goods Co. v. Yeldell</i> , 274 U.S. 112 (1927)	22, 23
<i>Maki v. Aluminum Building Products</i> , 73 Wash. 2d 23, 436 P.2d 186 (1968)	20
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	17
<i>McDermott v. Kansas Public Service Co.</i> , 238 Kan. 462, 712 P.2d 1199 (1986)	24
<i>Miller v. Kinsley</i> , 194 Neb. 123, 230 N.W.2d 472 (1975)	20
<i>Mishkin v. New York</i> , 383 U.S. 502 (1966)	8
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977)	23
<i>Palko v. Connecticut</i> , 302 U.S. 319 (1937)	23
<i>Rice v. Sioux City Memorial Park Cemetery</i> , 349 U.S. 70 (1955)	9, 13
<i>Sanders v. Clardy</i> , 551 So. 2d 1057 (Ala.), <i>cert. denied</i> , 110 S. Ct. 376 (Nov. 6, 1989)	14
<i>Southern Life & Health Insurance Co. v. Whitman</i> , 358 So. 2d 1025 (Ala. 1978)	12
<i>Thomas Construction Co. v. Diversified Contractors, Inc.</i> , 551 So. 2d 343 (Ala. 1989)	7
<i>Triangle Sheet Metal Works, Inc. v. Silver</i> , 154 Conn. 116, 222 A.2d 220 (1966)	21
<i>Tuttle v. Raymond</i> , 494 A.2d 1353 (Me. 1985)	20
<i>Tyler v. Judges of the Court of Registration</i> , 179 U.S. 405 (1900)	9
<i>United States v. Regan</i> , 232 U.S. 37 (1914)	26
<i>United States v. Ward</i> , 448 U.S. 242 (1980)	25
<i>Vincent v. Morgan's Louisiana & T.R. & S.S. Co.</i> , 140 La. 1027, 74 So. 541 (1917)	20
<i>Wangen v. Ford Motor Co.</i> , 97 Wis.2d 260, 294 N.W.2d 437 (1980)	20

TABLE OF AUTHORITIES—Continued

STATUTORY AND REGULATORY PROVISIONS:	Page
Ala. Code §§ 6-11-20 through 6-11-30 (Supp. 1988)	19
Alaska Stat. § 09.17.020 (Supp. 1988)	19
Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990)	19
Colo. Rev. Stat. §§ 13-21-102, 13-25-127 (Supp. 1986)	19
Conn. Gen. Stat. § 52-240(b) (Supp. 1989)	19
Fla. Stat. Ann. §§ 768.72 through 768.74 (West 1989)	19
Ga. Code Ann. § 51-12-5.1 (Supp. 1989)	19
Idaho Code § 6-1604 (Supp. 1989)	19
Ill. Ann. Stat. ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989)	19
Ind. Code Ann. § 34-4-34-2 (Burns 1986)	19
Iowa Code Ann. § 668A.1 (West 1987)	19
Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989)	19
Ky. Rev. Stat. §§ 411.184, 411.186 (1988)	19
Minn. Stat. Ann. §§ 549.191, 549.20 (West 1988) ..	19
Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990), 537.675 (Vernon Supp. 1988)	19
Mont. Code Ann. § 27-1-221 (1987)	19
Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989)	19
N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988)	19
N.J. Stat. Ann. § 2A:58C-5 (West 1987)	19
N.D. Cent. Code § 32-03.2-11 (Supp. 1987)	19
Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988)	19
Okla. Stat. Ann. tit. 23, § 9 (West 1987)	19
Or. Rev. Stat. §§ 30.925, 18.540, 41.315 (1987)	19
S.C. Code Ann. § 15-33-135 (Supp. 1988)	19
S.D. Rev. Code § 21-1-4.1 (1987)	19
Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 <i>et seq.</i> (Vernon Supp. 1990)	19
Utah Code Ann. § 78-18-1 (Supp. 1989)	19
Va. Code Ann. § 8.01-38.1 (Supp. 1989)	19

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:

Page

<i>Punitive Damages: A Constructive Examination</i> (Report of the Special Committee on Punitive Damages, Section of Litigation, American Bar Association) (Nov. 1986)	18
Johnston, <i>Punitive Liability: A New Paradigm of</i> <i>Efficiency in Tort Law</i> , 87 Colum. L. Rev. 1385 (1987)	18
Product Liability verdicts and Case Resolution in Five States (GAO/HRD-88-89, Sept. 1989)	18

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

 No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,
Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Pacific Mutual's highly selective statement of the case omits crucial facts. A fuller exposition of the factual record makes clear that this is not an appropriate case for deciding the extent to which the Due Process Clause of the Fourteenth Amendment limits state authority to award punitive damages—or any of the other questions presented in the petition.

A. The Fraud Perpetrated Against Respondents

Pacific Mutual seeks to portray the conduct that harmed respondents as a mere oversight not corrected in time.¹ In fact, this case involves a deliberate fraud perpetrated by Pacific Mutual's agents against respondents Cleopatra Haslip, Cynthia Craig, Alma M. Calhoun and

¹ See Petition for Certiorari ("Petition") at 6.

Eddie Hargrove—a fraud Pacific Mutual had reason to suspect but did nothing to prevent.

Respondents are black employees of the municipal government of Roosevelt City, Alabama, a small rural community. They purchased life and health insurance through group policies made available to city employees. In 1981, shortly after Blue Cross canceled the city's group policy, Mr. Lemmie Ruffin—one of the original defendants in this action—approached the City Clerk to offer replacement insurance. Ruffin was an employee of Pacific Mutual, and worked as an agent out of the company's regional office in Birmingham. After giving the City Clerk a business card indicating his affiliation with Pacific Mutual, Ruffin offered to secure group life and health insurance policies for city employees.²

Through Ruffin's efforts, Pacific Mutual made group life insurance available to Roosevelt City employees. Pacific Mutual does not, however, issue group health policies for municipalities—a fact Ruffin concealed from the City Clerk. Instead, as a matter of policy, Pacific Mutual encourages its agents and employees to broker group health insurance from other insurers. At trial, a Pacific Mutual official explained that the company pursued this policy because it increased overall sales of Pacific Mutual insurance; if agents were not able to package Pacific Mutual's group life insurance with another company's group health coverage, Pacific Mutual would risk losing the business of customers—like Roosevelt City—that required both types of coverage.³

Ruffin submitted a proposal to Roosevelt City on stationery bearing Pacific Mutual's letterhead.⁴ This pro-

² See Trial Transcript ("Tr.") 92-93, 433, 743.

³ Tr. 429 (Pacific Mutual allowed brokering of other company's group health insurance "for the sake of not losing the business"); *id.* at 431.

⁴ See Tr. 305 & Plaintiffs' Exhibits 2, 12.

posal provided Roosevelt City's municipal employees with group life insurance through Pacific Mutual, and group health insurance through Union Fidelity.⁵ During negotiations with the City Clerk, Ruffin falsely represented that Union Fidelity was a Pacific Mutual subsidiary providing hospitalization coverage.⁶ Roosevelt City accepted this offer, and the City Clerk began deducting premiums from the pay of employees who chose to purchase the insurance. Approximately \$53 was deducted from Ms. Haslip's semi-monthly paycheck of \$280, and similar amounts were deducted from the other respondents' paychecks. The City collected these premiums monthly and sent them to Ruffin.

Instead of forwarding these collected premiums to the insurers, Ruffin pocketed the money. As result, policies covering Roosevelt City's employees lapsed. Respondents never received late premium or cancellation notices because Ruffin and Pacific Mutual's agency manager for Birmingham—Mr. Patrick Lupia—together connived to change the billing address for the group health policy from the City Clerk's office to Pacific Mutual's Birmingham office. All late payment and cancellation notices from Union Fidelity thus went to Ruffin and his superior at Pacific Mutual.⁷ Unaware that their coverage was in jeopardy and eventually terminated, respondents continued to pay premiums to Ruffin, who continued to misappropriate them.⁸

The fraudulent scheme unravelled when Mrs. Haslip was hospitalized in January 1982 for kidney treatment. After incurring several thousand dollars in medical ex-

⁵ With the full knowledge and approval of Pacific Mutual, Ruffin was licensed to broker group health insurance from the Union Fidelity Life Insurance Company.

⁶ Tr. 100, 132, 228, 304, 317, 330.

⁷ Tr. 251-271, 393-394.

⁸ See Tr. 104-105, 161, 251-271.

penses, she discovered she had no health insurance. As a result, she could not afford any portion of her \$2,700 hospital bill. The hospital refused to release her until her daughter raised funds sufficient to pay \$600 of the bill. Mrs. Haslip also owed substantial amounts to her physicians. Her expenses for treatment exceeded \$3,800—*more than half her annual take home pay.*⁹ Unable to pay her debts, Mrs. Haslip was sued by the hospital and her urologist; became the target of a collection agency; suffered the ruin of her credit rating; and endured substantial mental anguish as a proximate result of the fraud. She still owes her creditors on these 1982 obligations. App. B3.¹⁰

In short, as the trial court found when it rejected Pacific Mutual's motion for judgment notwithstanding the verdict, "[t]he conclusion is inescapable that the fraud was intentional, gross, oppressive and malicious." App. A14.

B. Pacific Mutual's Role in the Fraud

To fortify its Due Process challenge to the "vicarious" imposition of punitive liability, Pacific Mutual seeks to put substantial distance between itself and this fraudulent scheme.¹¹ The Alabama Supreme Court, however, concluded otherwise. Based on facts petitioner omitted from its statement of the case, the Alabama Supreme Court found that

"there is no question that sufficient evidence existed to support the jury's determination that Lemmie Ruffin and his agency manager, Patrick Lupia, were acting within the line and scope of their employment with Pacific Mutual when Ruffin made the

⁹ Her yearly take-home pay was approximately \$6,720.

¹⁰ See also Tr. 190-200.

¹¹ See Petition at 17 ("Pacific Mutual was unaware of Mr. Ruffin's conduct and was given no opportunity to address the situation prior to the lawsuit").

representations to the plaintiffs that became the subject of this lawsuit."

App. B9 (emphasis added).

Indeed, Pacific Mutual's involvement was pervasive:

- Ruffin was a Pacific Mutual employee and agent;
- he worked out of an office staffed and paid for by Pacific Mutual;¹²
- he purported to be selling Pacific Mutual health insurance to Roosevelt City;¹³
- he used a Pacific Mutual business card and corresponded with the City Clerk on Pacific Mutual letterhead;¹⁴
- he prepared each month's bill on Pacific Mutual stationery;¹⁵
- his offer of a "package" of Pacific Mutual life insurance and Union Fidelity health insurance was made pursuant to an explicit Pacific Mutual strategy designed to increase Pacific Mutual's life insurance sales.¹⁶

Moreover, *Pacific Mutual's agency manager for the Birmingham office—Patrick Lupia—knowingly assisted the fraudulent scheme.* Lupia personally intervened with Union Fidelity to ensure that billing notices for the group health policy were diverted to him and Ruffin at Pacific Mutual's office in Birmingham rather than being sent directly to the insureds. The late premium and cancellation notices also went directly to Pacific Mutual's office. Indeed, at least one cancellation notice was addressed to Lupia himself. This diversion kept respond-

¹² Tr. 415.

¹³ Ruffin described the Union Fidelity group health policy as "the hospital part of Pacific Mutual." Tr. 100.

¹⁴ App. B2-B3; see also Plaintiffs' Exhibits 2, 7, 12.

¹⁵ See App. B2-B4; see also Tr. 124, 141, 448 and Plaintiffs' Exhibit 7.

¹⁶ See Tr. 429, 431.

ents ignorant of Ruffin's misappropriation of their premiums. See App. B3.¹⁷

Furthermore, the evidence showed that Pacific Mutual had long been aware of similar frauds perpetrated by Mr. Ruffin while acting as a Pacific Mutual agent, *and did nothing to prevent or remedy them*. One employee of Pacific Mutual's Birmingham office testified that she received and forwarded to Pacific Mutual officials frequent complaints about other frauds by Mr. Ruffin.¹⁸ Ruffin's prior victims also testified that they had complained to Pacific Mutual's home office to no avail.¹⁹ As the Alabama Supreme Court concluded, the evidence overwhelmingly demonstrated that:

"Lupia had received complaints from policy-holders alleging that Ruffin was engaging in fraudulent activities but he had done nothing to prevent them. Pacific Mutual's home office had received complaints regarding Ruffin's fraudulent activities but had done nothing about them."

App. B9.

C. The Jury Verdict

The jury was charged that it could award compensatory damages for both out-of-pocket loss and mental anguish caused by fraud, and counsel for respondents stressed these compensatory damages in evidentiary submissions and closing argument. The jury was also instructed that it could award punitive damages. The jury returned verdicts for each respondent in the following amounts: Mrs. Haslip, \$1,040,000; Mrs. Craig \$12,400; Mrs. Calhoun \$15,290; and Mr. Hargrove \$10,288. App. B3. Be-

¹⁷ See also Tr. 256-258, 395 and Plaintiffs' Exhibits 35, 36.

¹⁸ See Tr. 490-503.

¹⁹ Tr. 366-386 (testimony of Williams); Tr. 545-553 (testimony of Spencer).

cause these were general verdicts,²⁰ the extent to which the awards represented compensation for mental anguish and the extent to which they represented punitive damages cannot be determined. Indeed, there is no assurance that *any* portion of the award was punitive. As the trial court observed, "[t]he jury seems to [have] fashioned their awards in proportion to the damage done each plaintiff; awarding the most damaged plaintiff, Cleopatra Haslip, the larger award and the least damaged plaintiff, Eddie Hargrove, the least award." App. A15.²¹ Thus, Pacific Mutual's claim that it "was fined over \$1,000,000 for the acts of Mr. Ruffin" ²² is—at best—wholly insupportable speculation.

D. Review by the Alabama Courts

The trial court carefully reviewed the jury's damages awards. In particular, the court applied the standards and followed the procedures set forth by the Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), in determining whether the award was appropriate. In conformity with Alabama law, the court held a hearing, considered the relevant substantive criteria identified by the Alabama Supreme Court, and set forth in writing its reasons for upholding the award. The Alabama Supreme Court carefully reviewed the damages issues on appeal, and affirmed the trial court's judgment.

²⁰ Pacific Mutual did not request special verdicts, to which they were entitled.

²¹ The trial court specifically noted that Pacific Mutual had the full benefit of a fair-cross section of the community on its jury. See App. A15 ("The jury was composed of male and female, white and black, and in the opinion of the Court, acted conscientiously throughout"). Cf. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Thomas Construction Co. v. Diversified Contractors, Inc.*, 551 So. 2d 343 (Ala. 1989).

²² Petition at 9.

REASONS FOR DENYING THE WRIT

Although Pacific Mutual seeks review of a host of Fourteenth Amendment questions, the petition emphasizes two: (1) whether Due Process precludes an award of punitive damages by a jury exercising unconstrained, standardless discretion; and (2) whether Due Process precludes imposing “vicarious” liability on an innocent principal for the culpable conduct of an agent.

Plenary review is not warranted in this case for many reasons. The factual record does not present with sufficient clarity the issues Pacific Mutual raises. Point I. The Alabama law applied in this case is no longer in effect, and was unique to Alabama even when it was in effect. Point II. That law did not permit awards of punitive damages in the “unbridled discretion” of the jury, and therefore this case does not present the only issue about which the Court has indicated interest in this area. Point III. In any event, there is increasing reason for this Court to forebear from reaching the issue of purportedly standardless punitive damages awards. Point IV. And Pacific Mutual’s remaining questions present no unsettled issues of any significance. Point V.

I. THE FACTS OF THIS CASE DO NOT PRESENT AN APPROPRIATE SETTING FOR REVIEWING THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION.

Even if Pacific Mutual has identified due process issues that would merit review in an appropriate case, they should not be reviewed in this case because the record does not present them with sufficient clarity. See *Mishkin v. New York*, 383 U.S. 502, 512-513 (1966).

First, the record permits no firm conclusion as to whether punitive damages were awarded at all, or if so, in what amount. Because the jury rendered a general verdict in favor of each respondent, the awarded amounts in excess of out-of-pocket losses may well represent compensation for mental anguish. Mrs. Haslip, who received the largest award by far, suffered mental anguish, humiliation, and the loss of credit—which is par-

ticularly devastating to a person of her limited means—as a result of the fraud. Pacific Mutual thus has no sound basis for assuming that the *punitive* component of the jury award exceeded \$1,000,000. Given that Pacific Mutual may not have suffered *any* punitive award in this case, its due process challenges are wholly hypothetical and abstract.²³

Even if some part of the verdict is punitive, this Court cannot ascertain whether the punitive award was disproportionate to the compensatory award. It may be, for example, that most of the verdict in favor of Mrs. Haslip was compensatory.²⁴ Thus, even if Due Process required proportionality between the harm caused and the damages awarded—which it does not²⁵—the case does not squarely present the question whether the verdict violated “Pacific Mutual’s right to be free of grossly excessive, disproportionate damages awards.” Petition at *i*.

This ambiguity also prevents meaningful review of the issue whether Due Process is implicated by punitive damages awarded “without any necessary relationship to the amount of actual harm caused.” *Id.* Two members of the Court have indicated that constitutional scrutiny of common law punitive damages awards may be warranted because “[p]unitive damages are not measured against actual injury, so there is no objective standard that limits their amount.” *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645, 1655 (1988) (O’Connor and Scalia, JJ. concurring). Here even the actual injury is uncertain, making this an inappro-

²³ This Court does not “decide . . . abstract propositions.” *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 409 (1900); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-74 (1955).

²⁴ At trial, Mrs. Haslip specifically requested several hundred thousand dollars in compensatory damages for mental anguish, Tr. 811-813, and the jury was free to award more.

²⁵ The wrongfulness of intentional or reckless conduct can be assessed by many measures other than the quantum of harm caused. Other relevant measures include the magnitude of the risk created or the gravity of the wrong.

priate case for reviewing alleged disparities between actual injury and the punitive award. At a minimum, this issue should be addressed in a case where the facts establish that punitive damages were imposed without reasonable relation to actual harm.²⁶ The facts here do not present such an opportunity.

Second, even if review were warranted on the question whether Due Process precludes imposing punitive damages upon an "innocent principal," Petition at 20,—and it is not ²⁷—the facts of this case do not raise the issue. Pacific Mutual's liability did not arise solely from the unauthorized conduct of a renegade agent. To the contrary, as the Alabama Supreme Court made clear, Pacific Mutual's corporate responsibility was premised on *corporate* malfeasance. Pacific Mutual's Birmingham manager played an indispensable role in the fraudulent scheme. See App. B9. And Pacific Mutual's home office ignored repeated complaints—made both to the home office and to the Birmingham office—about other frauds by Ruffin. *Id.* Pacific Mutual therefore had ample opportunity to prevent the frauds perpetrated in its name, but did nothing. These facts render Pacific Mutual's due process challenge to "vicarious" liability for punitive damages wholly hypothetical and abstract.

II. PLENARY REVIEW WILL NOT RESULT IN THE ESTABLISHMENT OF PRINCIPLES OF CONSTITUTIONAL LAW APPLICABLE BEYOND THIS CASE BECAUSE THE LEGAL STANDARDS AT ISSUE WERE UNIQUE TO ALABAMA AND HAVE BEEN SUPERSEDED BY LEGISLATIVE ENACTMENT.

Plenary review of this case is also inappropriate because the court would be reviewing a system for assessing puni-

²⁶ This is particularly important because, as respondents will show in Point IV *infra*, there is substantial reason to doubt this assumption.

²⁷ See Point V *infra*.

tive damages that no longer exists in Alabama or anywhere else.

In 1987 Alabama enacted tort reform legislation placing new and extensive substantive and procedural constraints on punitive awards. In particular:

1. Plaintiffs must meet a burden of "clear and convincing" evidence;
2. Punitive damages may be awarded only where conscious or deliberate conduct is at issue;
3. No presumption of correctness is accorded by the trial court to the jury's decision respecting punitive damages, nor by the appellate court to any trial court rulings;
4. If the jury awards punitive damages, either party may move the trial court for a hearing or the admission of additional evidence on the propriety of the award. Any relevant evidence is admissible, including "the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether the defendant has been guilty of the same or similar acts in the past, the nature and extent of any effort by the defendant to remedy the wrong, and the opportunity or lack thereof the plaintiff gave the defendant to remedy the wrong complained of"; ²⁸
5. Punitive damages may not be awarded against a principal for conduct of the agent unless the principal has ratified, endorsed or benefitted from the agent's conduct; and
6. Punitive damages have, with very limited exceptions, been capped at \$250,000.

Ala. Code §§ 6-11-20 through 6-11-30. Although these legislative provisions did not apply to the present case, they have been in force in Alabama for more than two

²⁸ Similar protections had been established by the Alabama Supreme Court as a matter of common law in *Hammond* and were followed in this case.

years and will govern all present and future actions raising punitive damages claims like those at issue here. A ruling on the Alabama safeguards in effect before this tort reform legislation would thus provide little guidance as to the constitutionality of Alabama's current procedure.

Nor would a ruling in this case provide guidance as to procedures currently in effect in *other* States. To respondents' knowledge, no State makes use of a configuration of common law substantive limitations and procedural checks on jury discretion similar to that in force in Alabama—and scrupulously followed—during the trial in this case. Alabama law bifurcated punitive damages decisions. In making initial assessments, juries were required to evaluate the gravity of the wrong at issue and the extent to which punitive damages were needed to deter similar wrongs. See *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989); *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). To prevent bias, all evidence of the plaintiff's and defendant's financial condition was inadmissible. See *Southern Life & Health Insurance Co. v. Whitman*, 358 So. 2d 1025 (Ala. 1978).

In cases in which juries awarded punitive damages, the trial court was required to conduct a post-verdict evidentiary hearing, applying substantive criteria identified by the Alabama Supreme Court. See *Hammond*, 493 So. 2d at 1378-1379. The trial court was also required to make written findings stating reasons for accepting or modifying the jury verdict, and these findings were subjected to *de novo* review by the Alabama Supreme Court. See *Central Alabama Electric Cooperative v. Tapley*, 546 So. 2d 371 (Ala. 1989).

Because no other State uses this constellation of safeguards against improper punitive damage awards, plenary review of this case would provide minimal guidance as to the constitutionality of *other* States' procedural and substantive safeguards.

Pacific Mutual's challenge to the Alabama law in force in 1987 thus presents no issues of national significance,²⁹ and no issues of continuing significance even within Alabama. At bottom, Pacific Mutual seeks review of fact-bound, historical questions relevant to no one but itself. These considerations make review particularly inappropriate. See *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties") (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

Furthermore, review at this point would constitute an inappropriate intervention into a well-functioning state judicial and legislative effort to keep abreast of evolving concepts of fairness and the dictates of the United States Constitution. In *Bankers Life & Casualty Co. v. Crenshaw*, this Court expressed a clear preference for state common law and legislative solutions rather than a constitutional ruling federalizing the law of punitive damages, which are an important and longstanding part of state tort law.³⁰ Alabama has adopted far-reaching common law and legislative solutions. These reforms should be given time to be tested so that Alabama and other States can assess their efficacy and determine whether other changes might be needed.

²⁹ See generally Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

³⁰ The *Crenshaw* court observed:

"Our review of appellant's claim now would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the . . . State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims; failing that, the . . . state courts may choose to resolve the issue by relying on the state constitution or on some other adequate and independent nonfederal ground."

108 S. Ct. at 1651 (footnote omitted).

This Court has repeatedly followed that course in declining to grant certiorari to review due process challenges to common law systems for determining punitive damages, where subsequent legislative reform had substantially altered the governing standards and procedures. *E.g.*, *Sanders v. Clardy*, 551 So. 2d 1057 (Ala.), *cert. denied*, 110 S. Ct. 376 (Nov. 6, 1989); *Combined Insurance Co. v. Ainsworth*, 763 P.2d 673 (Nev.), *cert. denied*, 110 S. Ct. 376 (Nov. 6, 1989).³¹

III. THE LEGAL STANDARDS GOVERNING THE AWARD OF PUNITIVE DAMAGES IN THIS CASE DO NOT PRESENT ANY OF THE POTENTIAL CONSTITUTIONAL INFIRMITIES IDENTIFIED BY MEMBERS OF THIS COURT.

Plenary review in this case would be unwarranted even if the factual record and legal context presented no serious obstacles to review. This case does not raise the sole due process issue identified by this Court as worthy of consideration: whether punitive damages may constitutionally be imposed by juries "given unbridled discretion," *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor J., concurring in part), without statutory or common law standards constraining punitive awards. *See id.* at 2923 (Brennan, J., concurring). *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

Under Alabama common law, the jurors in this case were not "left largely to themselves" in deciding whether to award punitive damages. *See id.* To the contrary, as demonstrated, the jury's discretion was substantially confined and was subjected to searching *de novo* scrutiny both in a post-verdict evidentiary hearing in the trial court and on appeal.³²

³¹ Indeed, the Alabama procedures in effect when this case was tried were the State's initial judicial response to this Court's discussion of Alabama's prior common law rules governing punitive damages. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-829 (1986).

³² *See* Point II *supra*.

Furthermore, clear and specific substantive criteria guided this scrutiny. In *Hammond*, the Alabama Supreme Court identified *inter alia* "the culpability of the defendant's conduct," the need to "discourag[e] others from similar conduct," the "impact on the parties," and the "impact upon innocent third parties" as factors that should be considered by the trial and appellate courts reviewing punitive awards. 493 So. 2d at 1379. The trial court applied *Hammond* in this case. App. A15.

Subsequent to *Hammond* and to the trial in this case, but prior to appellate review of the verdict at issue here, the Alabama Supreme Court specified seven factors against which punitive awards must be measured:

"[1] Punitive damages should bear a reasonable relation to the harm that is likely to occur from the defendant's conduct as well as the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

"[2] The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or cover-up of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of responsibility.

"[3] If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of this profit, so that the defendant recognizes a loss.

"[4] The financial position of the defendant would be relevant.

"[5] All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

"[6] If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into

account in mitigation of the punitive damages award.

"[7] If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award."

Green Oil Co. v. Hornsby, 539 So. 2d at 223-224 (quoting *Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)). The considerations set forth in *Hornsby* governed the Alabama Supreme Court's decision in this case.³³ And the Alabama Supreme Court routinely conducted a comparative proportionality review to ensure consistency across the range of cases. See *Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d at 1053.

Alabama had identified specific substantive criteria that bear on the propriety of punitive damages, had forbidden jury consideration of potentially prejudicial evidence about the parties' financial status, and subjected punitive damages awards to searching post-trial and appellate scrutiny. These safeguards—which preserve a necessary and appropriate balance between flexibility and consistency in the law—more than satisfy Pacific Mutual's procedural due process right to a reasoned judicial decision predicated on trustworthy adjudicative procedures.

The mere absence of a legislatively prescribed range for punitive awards in no sense renders this common law regime so arbitrary or fundamentally unfair as to violate due process guarantees. As this Court has consistently recognized, state legislatures generally are "free to decide in sentencing how much discretion should be reposed in the judge or jury in noncapital cases." *Lock-*

³³ *Hornsby* was decided several months before the Alabama Supreme Court rendered its decision in the present case. That the court did not remand for application of these factors in a *Hammond* hearing as it did in *Hornsby* makes clear that the damages award at issue in this case raises no issue under the *Hornsby* factors.

ett v. Ohio, 438 U.S. 586, 603 (1978) (plurality opinion). Even in capital cases, this Court has recognized that juries must be able to consider an encompassing range of factors in making "the difficult and uniquely human judgments that defy codification and that build discretion, equity, and flexibility into a legal system." *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (quotation omitted).

The discretion exercised under Alabama law in deciding upon punitive damages was no greater than that involved in many substantive areas of the law—such as deciding "the best interests of the child," whether "reasonable care" has been exercised, or whether a fiduciary has exercised "due diligence." Nor was the discretion involved here any greater than that afforded juries deciding how much compensation is appropriate for pain and suffering or mental anguish. Many of the decisions our legal system requires cannot be reduced meaningfully to prescription. It does not follow, however, that decisions made in the absence of precise legislative formulations are necessarily arbitrary or unfair. So long as discretion is exercised within reasonable constraints, Due Process is satisfied. As demonstrated, ample constraints were in place in this case.

IV. RESPECT FOR ONGOING STATE REFORM EFFORTS AND RECENT EVIDENCE ABOUT THE ACTUAL IMPACT OF PUNITIVE DAMAGES CAST DOUBT ON THE WISDOM OF CONSTITUTIONALIZING PROCEDURAL REQUIREMENTS FOR PUNITIVE DAMAGES AWARDS.

Although this Court has indicated that plenary review may be warranted to determine the constitutionality of punitive damages awarded in the absence of legislative or common law standards, fundamental notions of judicial restraint and federalism counsel against review.

First, the factual assumption that runaway juries are awarding punitive damages bearing no reasonable or predictable relationship to harm inflicted by defendants is open to serious question. A special committee of the

American Bar Association concluded, after serious scrutiny of the issue, that "there is no clear evidence of a present or impending crisis in punitive damages. Much of the law is established and working well." *Punitive Damages: A Constructive Examination* (Report of the Special Committee on Punitive Damages, Section of Litigation, American Bar Association) at 1-2 (Nov. 1986). See also Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 Colum. L. Rev. 1385, 1387 (1987).

Very recently, the United States Government Accounting Office published a study of punitive damages awards in five States, concluding *inter alia* that punitive damages correlated strongly with the size of compensatory awards and that appellate review provided a substantial, well-functioning safeguard against excessiveness. Indeed, post-verdict review by the trial court and appellate review eliminated or reduced a substantial majority of punitive damages awards in the States studied. See *Product Liability: Verdicts and Case Resolution in Five States* (GAO/HRD-88-99, Sept. 1989) at 29, 31, 32, 41, 69. This body of information suggests that punitive damages pose no significant social or legal problem.

At a minimum, there can be no doubt that punitive damages raise complicated, controversial jurisprudential and policy questions. No clear consensus exists on the nature or extent of the problem, or on what substantive standards and procedural mechanisms, if any, should be required. Any effort by this Court to dictate constitutionally required substantive standards and procedural safeguards will necessarily entail a high degree of judicial activism—and an on-going commitment to resolve the many due process issues that will inevitably arise in the trail of any foray into the law of punitive damages. Issues this complex and controversial are far better resolved through the legislative process, after appropriate legislative fact-finding. Defendants like Pacific Mutual have ample access to the legislative process so there is no need for this Court to intervene to correct for failure

of that process. Tort reform like that enacted in Alabama and elsewhere is substantial evidence that petitioner and other potential defendants are fully able to protect their interests in the legislative arena.

Second, review by this Court would pretermitt an active re-examination underway in the States. Since the Court's first expression of concern about punitive damages in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828 (1986), and its subsequent invitation to the States in *Bankers' Life* to "enact legislation addressing punitive damage awards," *Bankers' Life*, 108 S.Ct. at 1651, the majority of states, including Alabama, have enacted substantial legislative reforms designed to limit and further channel awards of punitive damages³⁴—and other States are considering such reforms. Contrary to Pacific Mutual's repeated assertion that immediate guidance from the Court is needed, this ongoing nationwide effort by

³⁴ See Ala. Code § 6-11-20 *et seq.* (Supp. 1988); Alaska Stat. § 09.17.020 (Supp. 1988); Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990); Colo. Rev. Stat. §§ 13-21-102, 13-25-127 (Supp. 1986); Conn. Gen. Stat. § 52-240(b) (Supp. 1989) (applicable to product liability cases); Fla. Stat. Ann. §§ 768.72 through 768.74 (West Supp. 1989); Ga. Code Ann. § 51-12-5.1 (Supp. 1989); Idaho Code § 6-1604 (Supp. 1989); Ill. Ann. Stat. ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989); Ind. Code Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1 (West 1987); Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989); Ky. Rev. Stat. §§ 411.184, 411.186 (1988); Minn. Stat. Ann. §§ 549.191, 549.20 (West 1988); Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990), 537.675 (Vernon Supp. 1988); Mont. Code Ann. § 27-1-221 (1987); Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988); N.J. Stat. Ann. § 2A:58C-5 (West 1987) (applicable to product liability cases); N.D. Cent. Code § 32-03.2-11 (Supp. 1987); Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. §§ 30.925 (applicable to product liability cases) 18.540, 41.315 (1987); S.C. Code Ann. § 15-33-135 (Supp. 1988); S.D. Rev. Code § 21-1-4.1 (1987); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 *et seq.* (Vernon Supp. 1990); Utah Code Ann. § 78-18-1 (Supp. 1989); Va. Code Ann. 8.01-38.1 (Supp. 1989).

state legislatures makes it unnecessary and inappropriate for the Court to interfere—particularly in a State, like Alabama, in the forefront of legislative reform.

State legislatures have enacted a broad range and variety of measures to guide the award of punitive damages. Of the forty-five States that permit an award of punitive damages,³⁵ twenty (including Alabama)³⁶ now legislatively mandate that punitive damages may be awarded only where it is proved by at least “clear and convincing” evidence that the defendant engaged in the requisite conduct, and three other States have adopted this burden of proof as a matter of common law.³⁷

Nine States have enacted legislation capping punitive awards.³⁸ Several States have enacted statutory pro-

³⁵ Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington have abolished punitive damages except where explicitly authorized by statute. See *Vincent v. Morgan's Louisiana & T.R. & S.S. Co.*, 140 La. 1027, 74 So. 541 882 (1917); *Boott Mills v. Boston & M.R.R.*, 218 Mass. 582, 106 N.E. 680 (1914); *City of Lowell v. Massachusetts Bonding & Insurance Co.*, 313 Mass. 257, 47 N.E.2d 265 (1943); *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988); *Maki v. Aluminum Building Products*, 73 Wash.2d 23, 436 P.2d 186 (1968).

³⁶ See Ala. Code § 6-11-20; Alaska Code § 09.17.020; Cal. Code § 3294; Georgia Code § 51-12.5.1(b); Ind. Code § 34-4-34-2; Iowa Code § 668A.1(1)(a); Kansas Code § 60-3701(c); Kentucky Code § 411.184(2); Minnesota Code § 549.20, Subdivision 1; Montana Code § 27-1-221(5); Nevada Code § 42.005(1); North Dakota Code § 32-03.2-11; Ohio Code § 2315.21(c)(3); Oregon Code § 41.315; South Carolina Code § 15-33-135; South Dakota Code § 21-1-4.1; Utah Code 78-18-1(1).

³⁷ See *Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986) (*en banc*); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (1980).

³⁸ See Ala. Code § 6-11-21; Colo. Code § 13-21-102(1)(a); Fla. Code § 768.73(1)(a); Georgia Code § 51-12.5.1(g); Kansas Code § 60-3701(e); Nevada Code § 42.005.1; Oklahoma Code Title 23,

visions that: 1) specify standards guiding the determination or review of a punitive damage award;³⁹ 2) require or permit bifurcation of punitive damages trials;⁴⁰ 3) limit the admissibility of evidence of defendant's wealth;⁴¹ and 4) require court approval prior to the inclusion of a claim for punitive damages in a complaint.⁴²

The abundance of legislative measures since 1986 demonstrates the wide variety of possible approaches to guiding jury discretion in awarding punitive damages. Because the States are addressing exactly the issues identified in *Lavoie*, *Bankers Life*, and *Browning-Ferris*, review by this Court is unnecessary and inappropriate.

In *Banker's Life*, the Court declined to exercise jurisdiction over constitutional challenges to punitive damage awards, in part because it would be “unwise to foreclose” or “short-circuit” the possibilities of “less intrusive, and possibly more appropriate, resolutions” by state courts and legislatures. 108 S.Ct. at 1651. Exercise of the Court's jurisdiction in this case would “short-circuit” the reform efforts of state legislatures, which represent the collective judgment of constituents and which are particularly able, based on intimate knowledge of local conditions, to experiment with varying approaches to punitive damages that balance competing social and policy interests.

§ 9; Texas Code § 41.007; Virginia Code § 8.01-38.1. In addition, the Connecticut Supreme Court, in *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 115, 222 A.2d 220 (1966), held that an award of punitive damages is limited to plaintiff's litigation expenses less taxable costs.

³⁹ See Fla. Code §§ 768.73, 768.74; Kansas Code § 60-3701; Kentucky Code § 411.186; Minn. Code § 549.20 Subdivision 2; Mont. Code § 27-1-221; N.J. Code § 2A:58C-5; Oregon Code § 30.925.

⁴⁰ See, e.g., Georgia Code § 51-12.5.1(d)(2).

⁴¹ See, e.g., Colorado Code § 13-21-102(6).

⁴² See, e.g., Idaho Code § 6-1604(2).

V. PACIFIC MUTUAL'S REMAINING CHALLENGES TO THE PUNITIVE DAMAGES AWARD IN THIS CASE RAISE NO IMPORTANT FEDERAL QUESTION.

Pacific Mutual has raised a host of additional constitutional challenges to the punitive damages award in this case. None involves an important or unsettled question of federal law. Nor does any involve a conflict with decisions of this Court, state supreme courts, or federal courts of appeals.

a. *Vicarious Liability.* As demonstrated, the facts do not present the question whether punitive damages may be vicariously imposed without any showing of fault on the part of the principal.⁴³ The evidence at trial clearly implicated Pacific Mutual in its employees' malfeasance. This issue has, in any event, been firmly settled in the jurisprudence of this Court for more than 60 years, and need not be reconsidered.

In *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), the Court rejected a challenge identical to the one at issue here. In that case, which involved a challenge to an Alabama statute authorizing punitive damages for wrongful death, a unanimous Court held that the imposition of punitive damages "without personal fault, having its foundation in a recognized public policy, is not repugnant to accepted notions of due process of law." 274 U.S. at 115. The Court went on to explain that such statutes served the salutary policy of prompting vigilance by "those who . . . are able . . . in the management of their affairs to guard substantially against the evil to be prevented." *Id.* at 116.⁴⁴

⁴³ See Point I *infra*.

⁴⁴ In this case, the jury doubtless concluded that Pacific Mutual had ample opportunity to prevent the fraud and failed to do so.

Furthermore, contrary to the suggestions in petitioner's reply to respondents' opposition to their application for a stay, there can be no question that the Court understood the Alabama statute at issue in *Pizitz Dry Goods* to authorize punitive awards, and not

The Court in *Pizitz Dry Goods* also explicitly distinguished the only case Pacific Mutual cites in support of its novel proposition, *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101 (1893). In *Lake Shore*, the Court held merely that the majority position under the *common law* in 1893 was that punitive damages should not be imposed vicariously absent some showing of fault on the part of the principal. As *Pizitz Dry Goods* made clear, "no constitutional question was presented in *Lake Shore*." 274 U.S. at 115.⁴⁵

Nothing in the text of the Fourteenth Amendment, or in the history of its passage, even remotely supports the substantive limit on state authority advocated by Pacific Mutual. There can be no plausible claim that such a limitation is "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if it were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937). Nor has Pacific Mutual demonstrated that this substantive limitation is so "deeply rooted in this Nation's history and tradition" as to be a fundamental right. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). At bottom, Pacific Mutual urges this Court to indulge in "judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). Theirs is an economic substantive due process argument, pure and simple. Indeed, their position is so extreme that it was rejected in *Pizitz Dry Goods* even by a Court then disposed to favor substantive due process claims.

merely compensatory awards. That is why the Court explicitly held that the Constitution did not preclude State efforts to punish defendants who failed to prevent harm when they were in a position to do so.

⁴⁵ More recently, the Court cast considerable doubt on the correctness of *Lake Shore* even as a matter of common law. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, the Court noted that *Lake Shore* "may have departed from the trend of late 19th Century decisions." 456 U.S. 556, 576 n.14 (1982).

In any event, Alabama's tort reform legislation has now specifically addressed this precise question. Section 6-11-27 of the Alabama Code now provides that punitive damages may not be imposed on a principal for an agent's conduct unless the principal endorsed, ratified or benefitted from that conduct. Thus, even if Pacific Mutual's substantive due process claim had some merit, a ruling on this question would be of no current or continuing significance to anyone but Pacific Mutual.

b. *Criminal procedural protections.* Pacific Mutual urges this Court to decide whether the procedural protections afforded criminal defendants must, as a matter of Due Process, be extended to civil defendants facing possible punitive damages verdicts. This position has been uniformly rejected in the lower courts,⁴⁶ and need not be considered by this Court.

First, Pacific Mutual has not demonstrated—or even alleged—that it was deprived of any specific Fourth, Fifth or Sixth Amendment rights protecting criminal defendants. Pacific Mutual can make no plausible claim that it was forced to incriminate itself, that it was denied compulsory process, that it was denied effective assistance of counsel, that it was placed in double jeopardy, or that illegally obtained evidence was introduced against it. Thus, Pacific Mutual's claimed constitutional entitlement to these protections is not only vague and general, but also wholly hypothetical.

Second, the issue is unworthy of review in any event. As this Court's recent decision in *Browning-Ferris* makes clear, that a civil award may be imposed partially as punishment does not automatically entitle a civil defendant to the constitutional protections afforded crim-

⁴⁶ See, e.g., *Hansen v. Johns-Manville Products Corporation*, 734 F.2d 1036, 1042 (5th Cir. 1984), cert. denied, 470 U.S. 1051 (1985); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 234 Cal. Rptr. 835, 852 (Cal. App. 1987), cert. denied, 486 U.S. 1036 (1988); *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073 (Ariz.), cert. denied, 484 U.S. 874 (1987); *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 712 P.2d 1199, 1203 (1986).

inal defendants. 109 S. Ct. at 2913-2914. Rather, in holding the Eighth Amendment's Excessive Fines Clause inapplicable to punitive damages cases, the Court analyzed "the purposes and concerns of the Amendment, as illuminated by its history." *Id.* at 2914. Pacific Mutual has made no effort to show that the constitutional protections it seeks are appropriate in light of the purposes and histories of the Fourth, Fifth and Sixth Amendments. Nor could it. These provisions, like the Eighth Amendment, were intended to protect citizens against overzealous prosecution *by the government*. See *Browning-Ferris*, 109 S. Ct. at 2916.⁴⁷

Third, there is no merit to Pacific Mutual's claim that Due Process requires plaintiffs seeking punitive damages to prove their case beyond a reasonable doubt. No court has held—or even suggested—that the Constitution permits punitive damages to be awarded only when a plaintiff demonstrates his or her entitlement beyond a reasonable doubt. Therefore, no guidance from this Court is required. Indeed, the ruling that Pacific Mutual seeks would throw into doubt vast areas of well-established law. It has never been thought, for example, that anti-trust plaintiffs should be required by Due Process to demonstrate violations of the Sherman Act beyond a reasonable doubt before receiving treble damages—even though such damages are imposed in part to punish and deter. 15 U.S.C. § 15. Nor must civil RICO plaintiffs

⁴⁷ Pacific Mutual's reliance on *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), is wholly misplaced. As the results in *Browning-Ferris* and numerous other decisions make clear, the punitive quality of a civil judgment does not automatically trigger the full panoply of criminal procedural protections. See also, e.g., *United States v. Ward*, 448 U.S. 242 (1980), in which the Court held that civil monetary penalties for violating water pollution laws did not trigger application of Fifth Amendment rights accorded criminal defendants. Moreover, Pacific Mutual's reliance on *Mendoza-Martinez* ignores a critical distinction. In that case, the government was acting against the defendants. The risk of overzealous use of government's authority was thus present in civil litigation between private parties, of course, no such risk exists.

meet this exacting standard to obtain treble damages. 18 U.S.C. § 1964.

In any event, Pacific Mutual's claim has no merit. The Due Process Clause imposes on government the burden of proving criminal violations beyond a reasonable doubt because criminal punishment involves potential loss of liberty and serious stigma in most cases, and because government typically has at its command resources far beyond those of a criminal defendant. *See In re Winship*, 397 U.S. 358 (1970). These considerations are largely irrelevant to litigation between private parties. In other contexts, this Court has held that even the government need not prove its case beyond a reasonable doubt in proceedings involving civil penalties. *See United States v. Regan*, 232 U.S. 37 (1914) (civil penalty for inducing alien to enter country illegally).

c. *Equal Protection*. Pacific Mutual has also urged review of an alleged Equal Protection issue raised by the fact that the Alabama legislature has chosen to limit punitive damages in some, but not all, classes of cases. Because the petition for certiorari nowhere identifies the classes of cases in which punitive damages have been limited, there is no basis for evaluating whether the distinctions drawn by the legislature have a rational basis. This shortcoming alone should preclude review.⁴⁸

The challenge is frivolous in any event. Any number of rational reasons might have motivated the legislature to limit punitive awards in some classes of cases but not others. The legislature might well have determined that the need for deterrence was not great in the areas where awards were limited, or might have sought to protect particularly vulnerable industries from severe punitive

⁴⁸ If the equal protection question is premised on the restrictions on punitive damages imposed in Alabama's tort reform legislation, the question is unworthy of review. *See Point II infra*. That legislation was not in force at the time this case went to trial. Thus, there does not appear to be any basis for the alleged equal protection violation asserted in the petition.

awards.⁴⁹ In areas not limited, the legislature might have believed substantial injustices to be possible, and that other penalties in the law did not provide sufficient deterrence. In any event, this issue is not presented with sufficient clarity to permit review.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
CYNTHIA MISICKA
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400

ROBERT H. ADAMS
NAJJAR, DANABERG, MEYERSON,
MAX, WRIGHT & SCHWARTZ, P.C.
2125 Morris Avenue
Birmingham, Alabama 35203
(205) 328-5760

CHARLES E. SHARP
JOHN F. WHITAKER
SADLER, SULLIVAN, HERRING
& SHARP, P.C.
2500 Southtrust Tower
Birmingham, Alabama 35203
(205) 326-4166

Attorneys for Respondent.

* Counsel of Record

Dated: March 9, 1990

⁴⁹ Pacific Mutual's argument that strict scrutiny should apply because punitive damages affect its fundamental rights to engage in commercial speech and gain access to the courts is spurious.

MAR 26 1990

No. 89-1279

JOSEPH F. SARNIOL, JR.
CLERKIN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

**CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HALGROVE,**
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITIONER'S REPLY BRIEF

Of Counsel:

• VICKI W.W. LAI

ADAMS DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

BRUCE A. BECKMAN

*Counsel of Record*ADAMS DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

OLLIE L. BLAN, Jr.

BERT S. NETTLES

SPAIN, GILLON, GROOMS,
BLAN & NETTLES2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

J. MARK HART

SPAIN, GILLON, GROOMS,
BLAN & NETTLES2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100*Attorneys for Petitioner*
Pacific Mutual Life Insurance Company

No. 89-1279

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

**CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HALGROVE,**
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITIONER'S REPLY BRIEF

Of Counsel:

VICKI W.W. LAI

ADAMS DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

BRUCE A. BECKMAN

Counsel of Record

ADAMS DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

OLLIE L. BLAN, Jr.

BERT S. NETTLES

SPAIN, GILLON, GROOMS,
BLAN & NETTLES
2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

J. MARK HART

SPAIN, GILLON, GROOMS,
BLAN & NETTLES

2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

Attorneys for Petitioner
Pacific Mutual Life Insurance Company

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	v
A. THIS CASE PRESENTS IMPORTANT DUE PROCESS ISSUES REGARDING PUNITIVE DAMAGES IN AN APPRO- PRIATE FACTUAL SETTING	1
1. The Trial Evidence Cited By Respon- dents As Showing Pacific Mutual Was Implicated In Mr. Ruffin's Fraud Does Not Support Their Claim	1
a. The Trial Court Instructed The Jury That Lionel Williams' Testi- mony Did Not Show Notice To Pacific Mutual Of Mr. Ruffin's Conduct.....	2
b. The Trial Judge Instructed The Jury That The Testimony Of Bonnie Spencer, As Explained By The Testimony Of Frank Johnson, Did Not Show Notice To Pacific Mutual Of Mr. Ruffin's Activities.....	2
c. The Testimony Of Deborah Ault Was That She Received Com- plaints As To Mr. Ruffin For A Period Of Time, And Gave Them To Mr. Lupia, But Did Not Know Whether The Complaints In- volved Pacific Mutual	3

	Page
d. Notice To Mr. Lupia Was Not Notice to Pacific Mutual. Mr. Lupia Was Acting On Behalf Of Union Fidelity.....	4
2. Although A General Verdict Was Rendered, The Alabama Courts, And Counsel At All Levels Until Now, Have Considered And Treated The Verdict As Containing A Punitive Damages Award In Excess Of \$1,000,000.....	5
B. THE ALABAMA TORT REFORM ACT DOES NOT RENDER THE ISSUES RAISED BY THIS CASE UNWORTHY OF REVIEW	6
C. THE LEGAL STANDARDS IN THIS CASE RAISE THE ISSUES REGARDING WHICH THIS COURT HAS EXPRESSED CONCERN	7
1. The Jury Instruction Given In This Case On Punitive Damages Was Virtually Identical To That In <i>Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.</i>	7
2. Post-Trial Review Does Not Cure The Due Process Invalidity Of Inadequate Jury Guidance On The Amount Of Punitive Damages Awards	8

	Page
3. <i>Respondeat Superior</i> Liability For Punitive Damages Is The Rule In Twenty States.....	8
4. Prior Decisions Of This Court Do Not Foreclose The <i>Respondeat Superior</i> Issue	8
D. THE FACT THAT LEGISLATURES IN NINE STATES HAVE ENACTED TORT REFORM LEGISLATION AFFECTING PUNITIVE DAMAGES TO SOME DEGREE DOES NOT RENDER THE DUE PROCESS AND EQUAL PROTECTION ISSUES UNWORTHY OF REVIEW.....	9
E. THE FREQUENCY OF REMITTITUR OF PUNITIVE DAMAGES AWARDS BY TRIAL AND APPELLATE COURTS SHOWS THAT THE JURY PROCESS IS FLAWED.....	10
F. THE EQUAL PROTECTION ISSUES RAISED BY PACIFIC MUTUAL SHOULD BE REVIEWED BY THIS COURT.....	10

Page

LIST OF APPENDICES

APPENDIX A	
EXCERPT PAGES FROM REPORTER'S TRANSCRIPT.....	A-1
APPENDIX B	
APPELLEES' BRIEF (EXCERPT)	B-1
APPENDIX C	
EXCERPT FROM APPELLEES' BRIEF IN OPPOSITION TO PACIFIC MUTUAL'S APPLICATION FOR REHEARING	C-1
APPENDIX D	
STATES ALLOWING PUNITIVE DAM- AGES ON A <i>RESPONDEAT SUPERIOR</i> BASIS.....	D-1
APPENDIX E	
PUNITIVE DAMAGES CASES	E-1
APPENDIX F	
ALABAMA STATUTES LIMITING THE AMOUNT OF PUNITIVE DAMAGES RECOVERABLE	F-1

TABLE OF AUTHORITIES

Page

Cases

American Society of Mechanical Engineers v. Hydrolevel Corp. 456 U.S. 556 (1982)	9
Central Alabama Electric Cooperative v. Tapley 546 So.2d 371 (Ala. 1989)	6, 7
Industrial Chemical & Fiberglass Corp. v. Chandler 547 So.2d 812 (Ala. 1989)	7
Louis Pizitz Dry Goods Co. v. Yeldell 274 U.S. (1927)	9
Tramck v. Michaels of Oregon Co. No. 88-C-413-N (M.D. Ala.).....	7

State Statutes

Alabama Code § 6-11-22 (Supp. 1989).....	7
California Civil Code §§ 3294, 3295	10

Legislation

California Senate Bill 241, enacted in 1987	10
---	----

PETITIONER'S REPLY BRIEF

REPLY STATEMENT OF REASONS FOR GRANTING PACIFIC MUTUAL'S PETITION

A. THIS CASE PRESENTS IMPORTANT DUE PROCESS ISSUES REGARDING PUNITIVE DAMAGES IN AN APPROPRIATE FACTUAL SETTING.

Respondents' contention that this case does not present its Due Process issues with sufficient clarity is without substance.

1. The Trial Evidence Cited By Respondents As Showing Pacific Mutual Was Implicated In Mr. Ruffin's Fraud Does Not Support Their Claim.

Respondents claim that Pacific Mutual is not an innocent principal because it had direct notice of wrongdoing by Mr. Ruffin. Citing the trial testimony of Lionel Williams, Bonnie Spencer and Deborah Ault, Respondents' Brief In Opposition states at page 6:

"Furthermore, the evidence showed that Pacific Mutual had long been aware of similar frauds perpetrated by Mr. Ruffin while acting as a Pacific Mutual agent, and did nothing to prevent or remedy them."

This statement is false, and misstates the evidence.

a. The Trial Court Instructed The Jury That Lionel Williams' Testimony Did Not Show Notice To Pacific Mutual Of Mr. Ruffin's Conduct.

Mr. Williams testified that when a doctor refused to honor the insurance card of one of his employees, Mr. Williams called Pacific Mutual to see if Mr. Ruffin was an agent, and if Mr. Williams had insurance. In fact, he did. His complaint was that the employee's claim was declined, for unstated reasons [Reporter's Trial Transcript,¹ ("R.T.") pp. 372-376; 383; 387]. At the conclusion of direct examination, the trial court, on request of counsel, instructed the jury as follows [R.T. p. 386]:

"THE COURT: Notice to the company in California, this testimony is not for that purpose, because it comes subsequent to the events in this case. But you can receive this to determine any intent of Mr. Ruffin and his course of conduct. Go ahead."

b. The Trial Judge Instructed The Jury That The Testimony Of Bonnie Spencer, As Explained By The Testimony Of Frank Johnson, Did Not Show Notice To Pacific Mutual Of Mr. Ruffin's Activities.

Bonnie Spencer testified that she had purchased life insurance through Mr. Ruffin, that she paid her premiums to him in cash, received receipts, and later gave them to Frank Johnson; Mr. Johnson contacted Pacific Mutual and Pacific Mutual refunded all of her money [R.T. pp. 547-548].

¹ The cited portions of the Reporter's Transcript are set forth in Appendix A hereto.

Mr. Johnson testified that he wrote to Pacific Mutual on Mrs. Spencer's behalf in October, 1982, which was after the events in this case. Shortly thereafter, Pacific Mutual sent a check for the money he requested for Mrs. Spencer [R.T. pp. 548-556]. In the course of this testimony, the trial court gave the jury a limiting instruction as follows [R.T. p. 554]:

"THE COURT: October of '82, which is subsequent to the events in this case. This is not admitted for notice to Pacific Mutual of these transactions, but this piece of evidence goes to whatever the jury wishes to receive the evidence as it relates to the intentions of, plan or design of Mr. Lemmie Ruffin."

c. The Testimony Of Deborah Ault Was That She Received Complaints As To Mr. Ruffin For A Period Of Time, And Gave Them To Mr. Lupia, But Did Not Know Whether The Complaints Involved Pacific Mutual.

Respondents have cited Ms. Ault's testimony as if it showed direct notice to Pacific Mutual in California of complaints regarding Mr. Ruffin.

However, her testimony in fact was that she received two or three complaints a week from people complaining that they had purchased insurance through Mr. Ruffin, made claims and found they had no insurance, for a period of eighteen months, and that she gave these complaints to Mr. Lupia [R.T. pp. 490-492; 498-499; 502].²

² The trial court, somewhat incredulous, asked [R.T. p. 492]:

"THE COURT: Two or three a week?

"THE WITNESS: Yes, sir.

"THE COURT: Five hundred of them?

"THE WITNESS: Yes, sir."

(continued)

On cross-examination, Ms. Ault admitted that (i) she did not know whether the persons calling were claiming to be insured by Pacific Mutual, Union Fidelity or John Alden [R.T. p. 513], (ii) did not look them up in the office files to see if they were insured [R.T. p. 514], (iii) to her knowledge none of these callers ever wrote a letter to the agency office [R.T. pp. 514-515]; (iv) she had no knowledge of any of the callers ever suing Mr. Ruffin [R.T. p. 515]; and (v) although she opened the office mail, she never saw any correspondence regarding complaints by any callers to the Alabama Department of Insurance [R.T. pp. 515-516].

At most, Ms. Ault's testimony, if believed, would show notice to Mr. Lupia, which under the circumstances of this case, was not notice to Pacific Mutual. This will be discussed more fully below.

Respondents' claim that Pacific Mutual was implicated in Mr. Ruffin's fraud is without basis. The trial testimony cited shows no notice to Pacific Mutual prior to the events in this case.

d. Notice To Mr. Lupia Was Not Notice to Pacific Mutual. Mr. Lupia Was Acting On Behalf Of Union Fidelity.

The asserted involvement of Mr. Lupia changes no issues presented by Pacific Mutual. Mr. Lupia was not Pacific Mutual. No testimony showed that Mr. Lupia was ever on notice of any problem with premium payments being pocketed by Mr. Ruffin on any Pacific Mutual policy. Ms. Ault was unable to identify whether any of the alleged callers complaining of Mr. Ruffin were Pacific Mutual policyholders. To the extent Mr. Lupia sent a notice to Mr.

(ftn. continued)

Ms. Ault changed her testimony to state that the complaints only came in for eight or nine months [R.T. p. 502].

Passman, of Union Fidelity, requesting that the Union Fidelity premium notices on Respondents' policies be sent to Mr. Ruffin at the address of the Pacific Mutual office, he was merely one more agent acting on behalf of Union Fidelity, rather than Pacific Mutual, and acting contrary to (i) Pacific Mutual's interests, and (ii) Pacific Mutual's express instructions set forth in his contract. Mr. Passman's agreement to the request was on behalf of Union Fidelity, not Pacific Mutual.

At most, Mr. Lupia's asserted involvement in Mr. Ruffin's scheme means that Pacific Mutual was punished for the wrongdoing of two of its agents, rather than one.

2. Although A General Verdict Was Rendered, The Alabama Courts, And Counsel At All Levels Until Now, Have Considered And Treated The Verdict As Containing A Punitive Damages Award In Excess Of \$1,000,000.

The punitive damages issues in this case were presented to the Alabama courts by counsel for both sides as involving an award of over \$1,000,000. [See Appendix B (a portion of Appellees' Brief below; Appendix C, referred to below.)]

In its Appellees' Brief In Opposition To Pacific Mutual's Application For Rehearing [Appendix C (excerpt)], signed by Charles E. Sharp, John F. Whitaker and Robert H. Sprain, Jr., Respondents stated to the Alabama Supreme Court, at page 8:

"In view of the grossly fraudulent conduct committed by the defendants in this case, the imposition of \$1,040,000 in punitive damages was fitting; indeed, it will serve as punishment and the useful function of deterring others similarly situated from engaging in egregious conduct."

Respondents' attempt to avoid review of the important issues raised herein by now claiming that no ascertainable punitive damages award exists in this case is not supportable.³

B. THE ALABAMA TORT REFORM ACT DOES NOT RENDER THE ISSUES RAISED BY THIS CASE UNWORTHY OF REVIEW.

Respondents contend that the 1987 enactment of new tort reform legislation in Alabama removes any need for review by this Court.

The legislation enacted on June 11, 1987 after the cause of action arose in this case provides in part for (1) a \$250,000 "cap" on punitive damages awards in certain types of cases; (2) a higher standard of proof for punitive damages awards; (3) the removal of the presumption of correctness afforded to punitive damages awards; and (4) requests for post-trial evidentiary hearing on damages. The "guidelines" provided by such legislation does little, however, to set adequate limits on jury discretion. Moreover, it is apparent that the Alabama courts themselves still need guidance on the issue.

In *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371 (Ala. 1989), the Supreme Court of Alabama, expressed in dicta, its reluctance to place strict limits on jury discretion stating at page 337:

³ Further, in final argument, Respondents' counsel asked, for Mrs. Haslip, \$3,923.94 in actual damages, aggregated into a request for \$200,000 in compensatory damages, and asked for \$3,000,000 in punitive damages [R.T. pp. 810; 812; 814]. Therefore, if the jury awarded the full amount requested in compensatory damages, the punitive damages award would not be less than \$800,000 as to Mrs. Haslip alone.

"We can envision no set of carved-in-granite standards that would guide every jury in every conceivable case."

[Cf. *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So.2d 812, 837 n. 2 (Ala. 1989) (limiting jury discretion as to punitive damages would violate the Alabama constitutional right to trial by jury); *Tramck v. Michaels of Oregon Co.*, No. 88-C-413-N (M.D. Ala.) (constitutionality of the cap on punitive damages certified to the Alabama Supreme Court).

Moreover, review of the new legislation reveals that the legislation itself is flawed and fails adequately to protect the Due Process rights of defendants such as Pacific Mutual. For example, although the legislation places a \$250,000 cap in certain types of cases, as evidenced by *Tapley* and *Chandler*, the Alabama courts appear reluctant in practice to follow the legislature's mandates. Further, although the cap theoretically appears to be an improvement, the cap under Alabama law cannot act to guide a jury because the jury is prohibited from even being told of applicable caps in rendering their decision. [Alabama Code § 6-11-22 (Supp. 1989).]

C. THE LEGAL STANDARDS IN THIS CASE RAISE THE ISSUES REGARDING WHICH THIS COURT HAS EXPRESSED CONCERN.

Respondents claim that the jury in this case was not given unbridled discretion to award punitive damages in any amount, because of Alabama post-trial review procedures. This claim is not well-taken.

1. **The Jury Instruction Given In This Case On Punitive Damages Was Virtually Identical To That In *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.***

The jury was sent to the jury room in this case with no more guidance than to do as it thought best. That is precisely the basis, of the national Due Process issue regarding punitive damages.

2. Post-Trial Review Does Not Cure The Due Process Invalidity Of Inadequate Jury Guidance On The Amount Of Punitive Damages Awards.

No *de novo* hearing was conducted in this case. The trial court heard post-trial motions in the context of a presumption of the correctness of the verdict. Alabama gives the same extraordinary deference to jury awards of punitive damages as do the other states. The Alabama post-trial procedures do not differ in substance from post-trial review on motions for remittitur or new trial in other states.

This case clearly presents the Due Process issues, as well as the issue of the effect of judicial review as curing or not curing the Due Process impermissibility of unlimited jury discretion to award punitive damages.

3. *Respondeat Superior* Liability For Punitive Damages Is The Rule In Twenty States.

Alabama is not unique in imposing liability for punitive damages on a *respondeat superior* basis. This is the rule in twenty states [See Appendix D]. Further, under the Alabama Tort Reform Act, punitive damages may still be awarded on this basis if the jury believes that the principal "benefited from" the agents unauthorized, unratified acts.

4. Prior Decisions Of This Court Do Not Foreclose The *Respondeat Superior* Issue.

Respondents contend that the Due Process permissibility of imposing punitive damages on a vicarious liability basis is established by *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. (1927) and *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

Neither case supports Respondents' position.

Pizitz involved a challenge to Alabama's wrongful death statute, under which the only damages awardable are labelled "punitive damages." This statute, and the Alabama case law which has developed under it, is truly a *sui generis* area of law. Alabama so treats it, and in *Pizitz*, this Court agreed with the Alabama court that the Alabama wrongful death statute is remedial, not penal, and on that basis upheld the statute.

American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982), is discussed in Pacific Mutual's Petition. It should be noted that four Justices dissented in *Hydrolevel Corp.* on the ground that apparent authority is not a permissible basis for punitive damages, even in antitrust cases.

Neither *Pizitz* nor *Hydrolevel Corp.*, foreclose the issue of whether or not a principal may, consistently with Due Process, be held liable for punitive damages on a vicarious liability basis.

D. THE FACT THAT LEGISLATURES IN NINE STATES HAVE ENACTED TORT REFORM LEGISLATION AFFECTING PUNITIVE DAMAGES TO SOME DEGREE DOES NOT RENDER THE DUE PROCESS AND EQUAL PROTECTION ISSUES UNWORTHY OF REVIEW.

Some states have affected punitive damages awards to a greater or lesser extent by tort reform legislation. Much if

not most of this legislation has little effect on the issues presented here. In California, for example, Senate Bill 241, enacted in 1987, did nothing to require greater guidance to juries on the amount of punitive damages awards [Calif. Civ. Code §§ 3294, 3295].

**E. THE FREQUENCY OF REMITTITUR OF
PUNITIVE DAMAGES AWARDS BY TRIAL
AND APPELLATE COURTS SHOWS THAT
THE JURY PROCESS IS FLAWED.**

Respondents contend that selected studies show that current punitive damages doctrine is functioning appropriately. Appendix E hereto (Appendix 7 to Pacific Mutual's Appellant's Brief, below) shows both the escalation in frequency and amount of punitive damage awards, and the frequency of remittiturs, after which the awards are still staggering.

**F. THE EQUAL PROTECTION ISSUES RAISED
BY PACIFIC MUTUAL SHOULD BE RE-
VIEWED BY THIS COURT.**

Appendix F hereto sets forth the six Alabama statutes which limit punitive damages for specified categories of defendants, and comparable California statutes.

Respectfully submitted,

Of Counsel:

VICKI W.W. LAI
ADAMS DUQUE
& HAZELTINE

BRUCE A. BECKMAN
Counsel of Record
ADAMS DUQUE & HAZELTINE

CLAUDE L. BLAN
BERT NETTLES
SPAIN, GILLON, GROOMS
BLAN & NETTLES

J. MARK HART
SPAIN, GILLON, GROOMS,
BLAN & NETTLES

Attorneys for Petitioner
Pacific Mutual Life Insurance Company

APPENDIX A

**EXCERPT PAGES FROM
REPORTER'S TRANSCRIPT**

[Page 372 LIONEL WILLIAMS]

THE COURT: All right. The money was given, you gave the money to Mr. Ruffin?

THE WITNESS: Yes, sir.

THE COURT: You found out you didn't have any insurance; is that basically it?

THE WITNESS: Yes, sir.

THE COURT: That's basically what we've got here. Who were the checks made out to? Oh, you gave him cash.

THE WITNESS: Yes, sir.

THE COURT: What was it for, life insurance or what?

THE WITNESS: Health insurance.

THE COURT: With?

THE WITNESS: Pacific Mutual.

THE COURT: When did you find out you didn't have this insurance?

THE WITNESS: When an employee of mine went to the doctor and filed a claim.

THE COURT: Oh, it was a group policy?

THE WITNESS: Yes.

THE COURT: Your employee?

THE WITNESS: Yes.

[Page 373 LIONEL WILLIAMS]

THE COURT: Not you personally?

THE WITNESS: No.

THE COURT: Basically what we have here, I'll let you ask him some questions too, if you want to, Mr. Hart or Mr. Blan. Like I say, no full scale discovery but —

MR. HART: You say you contacted somebody about this?

THE WITNESS: Yes.

MR. HART: Who did you contact?

THE WITNESS: I contacted the office over here on Beacon Parkway, I guess is where it was, and after I talked to them and I didn't get any results, so I called California where the home office was where it was listed on the paper.

MR. HART: Who did you talk to there?

THE WITNESS: Several people whose names I don't remember but they referred me back to the office here, and I called back out to California again and as a matter of fact I think I called three times.

MR. HART: That's okay. Then what happened?

[Page 374 LIONEL WILLIAMS]

THE WITNESS: Nothing happened.

MR. HART: Was anything done about your bills not being paid or covered to you or your employees?

THE WITNESS: Nothing was done by the company.

MR. HART: I'm talking about by you and your employees, did y'all do anything else?

THE WITNESS: Well, we called back over to the office. We had to make arrangements with the doctor.

MR. HART: Was any lawsuit filed or anything like that?

THE WITNESS: No.

MR. HART: Did you make any complaints with the state insurance department?

MR. WHITAKER: He's fishing now, Your Honor. As you said, this is not a discovery.

MR. HART: What were you told about Pacific Mutual either here or in California?

MR. SHARP: Judge, I object to that. He's going into cross examination now.

THE COURT: Of course, I'm going to --

[Page 375 LIONEL WILLIAMS]

I'll let him in a little bit, we're not going to have a full scale deposition here. Go ahead.

MR. HART: That's the problem. What were you told here and in California?

THE WITNESS: That in fact he was working for Pacific Mutual and he was connected. My concern was whether or not he in fact was connected, and I wanted to know whether or not we had a policy and if we had policy numbers and who could put leverage on it in order to get some action.

MR. HART: Did they tell you the policies were cancelled?

THE WITNESS: No, as a matter of fact, they had the policy numbers.

THE COURT: Well, were the policies cancelled?

THE WITNESS: No, they weren't.

THE COURT: Ever issued?

THE WITNESS: Yes, they were issued, they were issued.

THE COURT: Well, did you have insurance?

THE WITNESS: I assume that we had insurance.

[Page 376 LIONEL WILLIAMS]

THE COURT: Well, what happened, was the bill paid?

THE WITNESS: The bill was not paid.

THE COURT: Well, there was no cancellation of the insurance?

THE WITNESS: Not to my knowledge.

MR. WHITAKER: Did you ever receive a notice of cancellation?

THE WITNESS: Never received a notice of cancellation.

MR. SHARP: That's the same thing we asked the administrator.

THE COURT: I just asked him whether it was cancelled and he said no.

MR. SHARP: Well, it's just like these people didn't know it was cancelled either.

THE COURT: I asked him was it cancelled, not if he knew it was cancelled, was it cancelled.

MR. SHARP: He doesn't know.

THE WITNESS: To the best of my —

THE COURT: No, no. Do you have anybody else out here?

MR. SHARP: No, sir, not right now.

* * *

[Page 383 LIONEL WILLIAMS]

MR. BLAN: Judge, can we just have a continuing objection?

THE COURT: Yes, sir.

MR. BLAN: To this testimony of Mr. Williams?

THE WITNESS: Mr. Lupia.

Q Lupia?

A Lupia.

Q And what did you tell Mr. Lupia?

A That I had paid for insurance, and no claim was allowed.

Q Did you get any satisfaction out of Mr. Lupia?

MR. BLAN: Object to the form.

THE COURT: Overruled.

THE WITNESS: I did not.

Q Did you get directed to some other person to call?

A No, not by him. I found on my own where the company was in California. I called the company in California.

Q Did you register the same complaint with the people in California?

* * *

[Page 386 LIONEL WILLIAMS]

THE COURT: Overruled.

THE WITNESS: Yes, sir.

MR. WHITAKER: That's all I have got.

Thank you, Mr. Williams.

MR. BLAN: Judge, we move to exclude his testimony on the basis that it is not similar in time to the matter of the claim that was made in this case. No claim in this case has been made against Pacific Mutual and has shown the basis of the denial of the claim. Has not shown anything similar to what was presented and what's claimed in this case. We think it is highly irrelevant and immaterial, and it comes subsequent to the events that took place in this case. We move to exclude the testimony.

MR. HART: Judge, we would ask for limited instructions again be considered on the issue of notice prior to the Roosevelt City situation.

THE COURT: Notice to the company in California, this testimony is not for that purpose, because it does come subsequent to the events in this case. But you can receive this to determine any intent of Mr. Ruffin and his course of conduct. Go ahead.

CROSS EXAMINATION

[Page 387 LIONEL WILLIAMS]

BY MR. HART:

Q Mr. Williams, in your conversation with Pacific Mutual in California, when you called them up, did you learn that you actually had a policy with Pacific Mutual?

A They had the number.

Q Okay. So you got a policy number from them; is that correct?

A That's correct.

Q Okay. Do you know whether — did they tell you that the policy had been cancelled?

A They did not.

Q Did you know whether that policy with Pacific Mutual was in force when your employee incurred his medical claim?

A I assume that it was.

Q And you don't know any different today, do you?

A Whether or not it's in force?

Q Right, what you know.

A No, I don't know.

* * *

DIRECT EXAMINATION

[Page 490 DEBORAH AULT]

BY MR. SHARP:

Q Ms. Ault, we are out of the presence of the jury. Now I want to make a showing of what your testimony would have been had I been allowed to ask you the questions while you were on the stand earlier this morning. I was asking you and I will just ask you now, did you get a phone call from the public, people that would call up and say that they had purchased insurance from Mr. Ruffin and had paid their premiums, had gone into the hospital or seen a doctor, made a claim only to find out that they did not have insurance?

A Yes, sir.

Q All right. Now, when you received that information as a receptionist, what did you do with that information?

A I informed Mr. Lupia that we had a problem with one of Lemmie's clients and I told him what the problem was and then he told me that he would talk to Lemmie and they would take care of it.

[Page 491 DEBORAH AULT]

Q Would you give him the name of the person that called?

A Yes.

Q And you would report to your boss, Mr. Lupia, the agency manager of the complaint?

A Yes, sir.

Q How many — do you have any specific recollection of the name of any of these people?

A No, sir.

Q When would the time have been — when would the times have been, the dates have been, we'll say when you first reported to the manager this situation?

A I don't know specific dates.

Q Well, a year and a month or a year and a season or something of that nature?

A Approximately 4 of 5 months after Lemmie started working for us.

Q Now, Lemmie started working in the summer of 19

—
MR. WHITAKER: March of 1980.

MR. SHARP: March of 1980. So 6 months would be about November of 1980, approximately?

A Yes.

Q All right. And what did Mr. Lupia do, did he ever go, did he ever do anything to you, I mean by

[Page 492 DEBORAH AULT]

doing anything, do you know of any action he ever took?

A I know that he called Lemmie into his office and talked to him, but as to what they talked about, I don't know. I was not involved in that.

Q Say between November of 1980 and we'll say January of 1982, about how many such instances did you personally receive from the public, reports to Mr. Lupia, in your judgment?

A Two to three a week.

Q Two or three a week?

A Yes.

Q Thank you.

MR. SHARP: I would like to offer that after lunch.

THE COURT: Two or three a week?

THE WITNESS: Yes, sir.

THE COURT: Five hundred of them?

THE WITNESS: Yes, sir.

MR. WHITAKER: That wouldn't be 500, Your Honor. Two or three a week for a year, no, no, no.

THE COURT: 1982 — that's true.

MR. SHARP: But three would be 150 and two [...]

* * *

[Page 498 DEBORAH AULT]

Q (BY MR. SHARP:) What were their complaints, just tell the jury, first of all the date when the complaints began.

A Five or six months after Lemmie started working.

Q And I think we have just established he started in the summer of '80?

A Yes, sir.

Q So, it would be about November of '80?

A Yes, sir.

Q Approximately?

A About that.

Q All right. Tell the ladies and gentlemen of the jury what were the complaints.

A Well —

MR. HART: If Your Honor please, that's a very broad question. We would object to the form of it.

THE COURT: The fact that she received complaints and then what she told somebody else would be what I would —

MR. SHARP: All right. When the people would call in, first of all I would like to establish

[Page 499 DEBORAH AULT]

who are the people that you're talking about that would call in? What —

A Clients.

Q Clients?

A Uh-huh.

Q Is that like policyholders?

A Yes, sir.

MR. BLAN: Object to it. It's leading. He's leading the witness and suggesting the answers.

THE COURT: Overruled. Go ahead.

Q (BY MR. SHARP:) And what type of information would they give you over the phone?

A They would tell me that they had purchased insurance with our company through Lemmie Ruffin and then when they had submitted a claim, they had been in the hospital, or seen a doctor and they were informed that they did not have insurance with us.

Q And what would you do with that information?

THE COURT: Now, ladies and gentlemen, this evidence is not received for the truth of it. I mean the fact that some complaint was made does not mean it is true. That is not what this is offered for.

* * *

[Page 502 DEBORAH AULT]

three times a week?

A Approximately, I don't know, eight or nine months.

Q When you would give this information to Mr. Lupia, would he make a statement to you?

A Yes, he would tell me that he would talk with Lemmie about it and they would take care of the problem.

Q Did you have any other responsibilities other than to report to Mr. Lupia?

A No, sir.

Q Were there occasions that Mr. Ruffin would go into Mr. Lupia's office to your knowledge and they would have conversations?

A Yes, sir.

Q Do you have any knowledge as to what was being said and done?

A No, sir, I don't.

Q When these calls, these two to three calls a week, were they different people or were they the same people or a combination thereof?

A A combination. Sometimes it was the same person for either or either a different person from [. . .]

* * *

[Page 513 DEBORAH AULT]

Q And you told him up until that time that you didn't know anything that went wrong in that office, isn't that right?

A Yes, sir.

Q Now, isn't it also true in the deposition, Ms. Ault, that you told Mr. Eden that you didn't know when those calls came in, you didn't know what time frame or what time period they were?

A I might have, I don't remember.

Q Well, you really don't, do you?

A I knew that they were five or six months after he started working.

Q You said they only continued for eight or nine months?

A I think so.

Q Then they stopped?

A As far as I know.

Q And you don't know the names of any of those people that called, do you?

[Page 514 DEBORAH AULT]

A No, sir.

Q You don't really know whether it was policyholders of Pacific Mutual or Union Fidelity or John Alden or any other company, do you?

A No, sir, they just told me that they had made a claim and did not have insurance.

Q Did you handle any claims through the office over here in Birmingham?

A No, sir.

Q You didn't look up to see whether or not they had a policy or a claim, did you?

A No, sir.

Q And you're saying that you received two or three of those a week?

A Yes, sir.

Q And you reported them to Mr. Lupia and he said that he would take care of them?

A Yes, sir.

Q You don't have any idea what happened from that point on, do you?

A No, I don't.

Q You don't know whether the claims were paid or not paid, do you?

A No, I don't.

Q And as a matter of fact none of those people ever wrote you a letter and said they had a complaint, did they?

[Page 515 DEBORAH AULT]

A I didn't personally receive a letter, no.

Q You didn't see any letters that anybody wrote to the office over here in Birmingham where they were making complaints about Mr. Ruffin, did you?

A No, sir.

Q And did any of those people ever sue Pacific Mutual or Lemmie Ruffin while you were working there?

A I don't know.

Q You never say any lawsuits against Lemmie Ruffin or Pacific Mutual by people making claims, any kind of complaints on the insurance policies?

A No, sir.

Q And you didn't see any lawsuit against Pacific Mutual by those people making any complaints on the policies during that time, did you?

A No, sir.

Q Did you ever receive any complaints from the insurance department about people who were making complaints against Lemmie Ruffin?

A I wouldn't have gotten those calls.

Q You never say any, did you?

[Page 516 DEBORAH AULT]

A No.

Q If they came in in writing you didn't see them, did you?

A No, sir.

Q But you opened all the mail, didn't you?

A Yes, sir, I did.

Q So, if they came in you would have seen them, would you?

A Not necessarily.

Q You opened all the mail, didn't you?

A I opened the mail as long as it was addressed to Pacific Mutual.

Q And you know, Ms. Ault, don't you, if the insurance department of the state had a complaint about Lemmie Ruffin, they would have written to Pacific Mutual or Mr. Lupia?

A It would have had Mr. Lupia's name on it.

Q You never got any of those, did you?

A No, sir.

Q Ms. Ault, you testified in the deposition, did you not, that you knew nothing at all about any transactions

that Lemmie had had with Roosevelt City?

A That's true.

* * *

[Page 547 BONNIE SPENCER]

A No, sir.

A I want to ask you some questions, is that okay with you?

A Yes, sir.

Q Okay. At some point you thought something may not be right with your insurance, is that right?

A Yes, sir, I kind of felt like something was wrong.

Q And you got Mr. Johnson to check into it for you, is that correct?

A That's correct.

Q Did Mr. Johnson contact the home office of Pacific Mutual?

A Yes, sir.

Q Then as a result of that contact did Pacific Mutual pay you back all your money?

A Yes, sir.

Q And you got that, didn't you, ma'am?

A Yes, sir.

Q Okay. And did they do that shortly after Mr. Johnson contacted them?

A That's right.

Q How much money did Pacific Mutual give you

[Page 548 BONNIE SPENCER]

back?

A Four hundred and something, four hundred, I don't know exactly.

Q Four hundred and something dollars?

A Yes, sir.

Q But that was what you had paid Mr. Ruffin?

A Yes, sir.

Q Okay.

MR. HART: That's all. Thank you.

THE COURT: Anything further?

MR. WHITAKER: No.

THE COURT: Come help her down.

[Page 548 FRANK JOHNSON]

FRANK JOHNSON,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WHITAKER:

Q Would you give me your full name, please, sir.

A Frank Johnson.

[Page 549 FRANK JOHNSON]

Q Where are you employed, Mr. Johnson?

A Protective Industrial Insurance Company.

Q Is that what they call a debit insurance company?

A Yes, it is.

Q Would you explain to some of the ladies and gentlemen of the jury what a debit insurance company is?

A Debit insurance is an insurance company by which agents are employed to sell and collect premium and make personal collections at the home of the policyholders.

Q On a weekly or monthly basis?

A Usually on a weekly or monthly, even though some policyholders may pay in longer intervals, quarterly, semi-annually or perhaps annually.

Q Mr. Johnson, do you have a client by the name of Ms. Spencer in Tuscaloosa?

A No, I don't.

Q Do you represent Ms. Bonnie Spencer's daughter?

A Yes, I have a client in Tuscaloosa by the name of Ms. Thelma Weaver.

[Page 550 FRANK JOHNSON]

Q How is she related to Ms. Spencer?

A She's the daughter of Ms. Bonnie Spencer.

Q Mr. Johnson, sometime in the early fall of 1982, were you contacted by Ms. Spencer's daughter?

A Yes, I was.

Q As a result of that conversation did you go see Ms. Spencer?

A Yes, I did.

Q Would you explain to the ladies and gentlemen of the jury what you found when you went to see Ms. Spencer.

A Okay. First, Ms. Weaver told me that her mother had purchased a policy from somebody, and whoever this somebody was that she purchased the policy from says her daughter had known me for a long time and had known me to be her personal and family insurance person that they had confidence in. They wanted me to look into her mother's situation. She believed that the policy that she had bought that for some reason or another she didn't know the details of it, she wanted me to come up and perhaps enlighten her as to the details of her policy. And of course, I said to Ms. Weaver that just as soon as I have a

[Page 551 FRANK JOHNSON]

chance to come to Birmingham I'll stop by your mother's and look into her situation.

Q Did you go by her house?

A Yes, I did.

Q Tell us what you found there.

A Okay. When I went to Ms. Spencer's home the first thing I asked her — well, naturally I greeted her and after greeting then I told her that I was coming to look into what her policy, what problems might be. And I asked her what did she think that the problem was. She said, well, I've got a policy here.

Q What kind of policy was it?

A Insurance policy here.

Q What company?

A It was from Pacific Mutual.

Q Did you look at the policy?

A Yes, I did.

Q What did you find in the policy?

A I found that she had a policy that was issued in the amount of \$5,000 and it had a premium of about eighty-odd dollars per month which was due payable by some means, such as some preauthorized

[Page 552 FRANK JOHNSON]

bank draft or what have you of \$80.00 per month.

Q So, you found that her premium was \$80.00 a month and it was supposed to be paid in some check deduction or something like that?

A Yes, sir, I did.

Q Did she tell you how she was actually paying the premiums?

A Yes, sir. I said, well, I asked her, I said, well, are you paying this person eighty-something dollars a month? And she said no, she says I'm not paying them

eighty-something. She said, let me show you what I'm paying him. And it was at this point that she began to bring out business cards that revealed an amount that she was paying to an agent named Lemmie Ruffin, who was on the reverse side of the business card.

Q And what was the company name on that business card?

A It was an agency. It was some agency. I've can't [sic] totally recall, it was some agency.

Q Does the Lupia Agency sound familiar to you?

A Would you repeat that again?

[Page 553 FRANK JOHNSON]

Q Lupia agency?

A That sounds a bit familiar but I couldn't say for sure, but it sounds familiar.

Q Did you collect these receipts and add things up?

A Yes, sir, I did collect those receipts from her.

Q Did you subsequently write a letter to Pacific Mutual about the payments of this money?

A Well, I did subsequently but it was after talking with someone at Pacific Mutual by way of telephone, before this happened.

Q And can you look on what —

(Whereupon, Plaintiff's Exhibit Number 18 was marked for identification.)

Q (BY MR. WHITAKER:) Can you look on what's been marked for identification as Plaintiff's Exhibit Number 18 and tell me — is this the letter that you wrote or at least the first page of the letter that you wrote?

A Yes, sir, that is the letter that I wrote to Pacific Mutual.

[Page 554 FRANK JOHNSON]

MR. WHITAKER: I'm going to offer that.

MR. HART: I don't mind, it's just not on the notice.

THE COURT: Yes. Ladies and gentlemen, let me see the date on that.

THE WITNESS: October of '82.

THE COURT: October of '82, which is subsequent to the events of this case. This is not admitted for notice to Pacific Mutual of these transactions, but this piece of evidence goes to whatever the jury wishes to receive the evidence as it relates to the intentions of, plan or design of Mr. Lemmie Ruffin.

Q Now, if you can, can you see that from over there, do you want to come on down here?

A Well, I can't totally see it from here.

Q (BY MR. WHITAKER:) Come on down here. Can you look on this, come on up here with me, can you look on this and tell me when the premiums first started to be paid?

A Yeah, this first date here represents the bottom portion of an application that was given to Ms. Spencer on the initial application.

[Page 555 FRANK JOHNSON]

Q And that date is?

A It looks like.

Q It's March of 1981, does that look familiar to you?

A That looks familiar.

Q And do each one of these days and each one of these numbers represent payments made by Ms. Spencer?

A Yes, they did.

Q You can go on and sit down. And did you as a result of Plaintiff's Exhibit 18, were you able to recover money from Pacific Mutual?

A Yes, sir, I recovered the amount in question.
MR. WHITAKER: That's all I've got.

CROSS EXAMINATION [FRANK JOHNSON]

BY MR. HART:

Q Mr. Johnson, after you looked into this, I understand you did contact Pacific Mutual; is that right?

A That is correct.

Q And did you contact Pacific Mutual out in

[Page 556 FRANK JOHNSON]

Newport Beach, California?

A Yes, sir, I did.

Q And that's where the home office is?

A Yes, sir, that's whom I contacted.

Q Okay. After you contacted Pacific Mutual in Newport Beach they responded to you didn't they?

A Yes, sir, they responded.

Q And did Pacific Mutual say they could either give Ms. Spencer coverage under the policy for the months she paid or she could get her money back, whichever she wanted?

A No, sir, they did not.

Q But they did give her all of her money back; is that correct?

A They sent the money requested.

Q Okay. And that was shortly after you had contact with them; is that right?

A That is correct.

Q And no lawsuit had been filed then?

A No, sir, no lawsuit. The only thing Ms. Spencer was interested in was getting her money back.

Q And she got that?

A She got that.

[Page 557 FRANK JOHNSON]

Q Shortly after you contacted the company and told them about it?

A Yes.

MR. HART: Thank you.

MR. WHITAKER: I have no further questions.

THE COURT: Thank you. You can step down.

MR. SHARP: We'd better get these things into evidence. These are documents that we have gotten from their files.

THE COURT: Were they produced —

MR. SHARP: Yes. Here is his contract, his Century contract.

THE COURT: Whatever.

MR. SHARP: Mark that one.

THE COURT: Mark them all.

MR. SHARP: We've got some answers to interrogatories, of course, we don't have the interrogatories, but it gives the name of the policies cancelled; is that correct?

THE COURT: The effective dates and —

MR. BLAN: We don't have any objections to the first one but we would object as to the list we prepared in response to Your Honor's order which [. . .]

* * *

[Page 810 FINAL ARGUMENT]

going to ask you to return a verdict in our favor and I'm going to ask you for punitive damages. Can you do that, a substantial amount of money, can you do that? And every one of you by your silence, that yes, you could. I'm going to show you what we consider to be a considerable amount of money and I'm going to explain to you the reasons why a verdict should be returned for this

amount.

There are compensatory damages and there are punitive damages. As far as the compensatory damages go, Ms. Cleopatra Haslip, she had a Baptist Medical Center Princeton bill for \$2,200. She had a lawsuit filed December 17, 1982, 7 to 8 months after she got out of the hospital. The amount of the claim in that lawsuit was \$2,213.75. The court costs that she would be responsible for in paying that bill is \$37.00, the interest on that amount of money that she owed to Baptist Medical Center-Princeton is \$110.68. The attorney's fees sought by the lawyer for Baptist Medical Center-Princeton in that lawsuit was \$448.51. All outstanding. Dr. Richard Dale's bill was \$600. She's already testified that she's got it down to \$250 and that's what that exhibit shows to you, that [. . .]

* * *

[Page 812 FINAL ARGUMENT]

lawyer be instructed not to argue that.

THE COURT: That's not part of the damages. Is that on the board there, hiring a lawyer?

MR. WHITAKER: There's no monetary amount there, Your Honor. We're not claiming any fees, it's just the idea that she had to hire a lawyer.

THE COURT: Let's don't do that.

MR. WHITAKER: Five years of waiting, in February of 1982 she finds out hospital urologists they don't wait, they sued her, she had some judgments against her, her credit is damaged, must do without, suits on her credit report, bad credit. Continued frustration and worry and anxiety for five years. She should have been paid in January of '82. She should have been paid probably, maybe more correctly should have been paid

in February of '82. Compensatory damages we claim is as a result of what she had to suffer over the last five years, not only this amount of money that she owes but we think it should bring a verdict in the amount of \$200,000. We think all of this damage she's entitled to \$200,000 compensatory damages.

Now, I explained to you this: I told you [. . .]

* * *

[Page 814 FINAL ARGUMENT]

state of Alabama we're asking that you return a verdict in favor of Ms. Haslip in punitive damages in the amount of \$3,000,000 in total damages to Ms. Haslip for \$3,200,000.

Ms. Alma Calhoun who purchased life insurance and medical care for her family and herself relied on insurance for the protection of her family and herself, was cut each pay period, didn't want the public hospital to pay and became ill and found out that she had no insurance, paid for \$1,000,000 policy that they promised. We're asking that you return a verdict in the amount of \$510,000 representing \$10,000 compensatory damages, \$500,000 punitive damages.

We're asking the same amount for Cynthia Craig. Cynthia Craig is 32 years old now and was 27 at the time she purchased her own insurance, during that period of time when it was her responsibility, no one else looks after her, she does live with her parents but she's self-supporting. She would have never known of the lapse. We're asking for damages for her injuries, compensatory damages of \$10,000, punitive damages in the amount of \$500,000 for a [. . .]

APPELLEES' BRIEF

VI. THE AWARD OF PUNITIVE DAMAGES, GIVEN THE FACTS OF THIS CASE, IS NOT EXCESSIVE AS A MATTER OF LAW, NOR WAS IT THE RESULT OF BIAS, PASSION, CORRUPTION OR OTHER IMPROPER MOTIVE AND THEREFORE SUBJECT TO REMITTITUR BY THIS COURT.

As stated in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986):

We begin by recognizing that the right to a trial by jury is fundamental, a constitutionally guaranteed right, Art. I, Section 11, Const. 1901, and therefore that a jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection. It is only in those cases that a trial court, pursuant to A. R. Civ. P. 59(f), and this court, pursuant to Code 1975, Section 12-22-71, may interfere with a jury verdict.

Id., at 1378

In *Hammond* this Court stated its desire to have the trial judge give serious consideration to the factors applied to remittitur. This Court now requires the trial courts to record reasons for interfering or refusing to interfere with a jury verdict. *Id.*, at 1379. When the trial court refuses to grant a new trial because the judge does not believe the verdict is excessive or based on some improper motive, that the rebuttable presumption

surrounding a jury verdict is strengthened. *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1986). See also *International Union, v. Palmer*, 267 Ala. 683, 104 So. 2d 691 (1956); *Birmingham Elec. Co. v. Howard*, 250 Ala. 421, 34 So. 2d 830 (1948).

The trial court gave serious consideration to the award:

As has been stated throughout this Order, it is the opinion of this court that the conduct in this case evidenced intentional, malicious, gross, or oppressive fraud. In addition to the acts of Mr. Ruffin, the testimony draws an inference that Mr. Patrick Lupia, manager of the local Pacific Mutual office, had notice of past problems with Mr. Ruffin including, but not limited to, prior acts of fraud, and that he participated in the decision to have the cancellation notice sent to the Pacific Mutual Agency rather than to the insured. It goes without saying that it is highly desirable to discourage others, similarly situated from similar conduct.

The trial judge did not consider the awards to be excessive as a matter of law:

[N]or is the verdict based upon bias, passion, corruption, or other improper motive. The jury seems to fashioned [sic] their awards in proportion to the damage done each plaintiff; awarding the most damaged plaintiff, Cleopatra Haslip, the larger award and the least damaged plaintiff, Eddie Hargrove, the least award.

The jury was composed of male and female, white and black, and in the opinion of the Court, acted conscientiously throughout the trial (R. 334).

Based upon the uncontroverted evidence presented at trial it simply cannot be said that the verdict is excessive as a matter of law, or that it was based upon some improper motive. Ruffin intentionally committed fraud by continuing to collect insurance premiums on canceled policies. Lupia participated just as surely as if he went out to collect the money himself. The late premium and cancellation notices were diverted to the Pacific Mutual offices. This is a case of gross deception, not of poor judgment, as may be found in bad faith cases. The amount, if anything, was too low given the expressed purpose of punitive damages to punish and prevent a recurrence [sic]. This state's legislature, in enacting the recent Tort Reform Bill, has recognized the seriousness of fraud where there can be shown a pattern or practice, and left it to the jury's discretion to award punitive damages for the punishment/prevention effect. The trial court made the required review and found no fault with the amount. This Court should not impose its personal views on the amount awarded and should allow the verdict to remain. See, *B & M Homes v. Hogan*, 376 So. 2d 667 (Ala. 1979); *Vest v. Gay*, 275 Ala. 286, 154 So. 2d 297 (1963); *Airheart v. Green*, 267 Ala. 689, 104 So. 2d 687 (1958); *National Sur. Co. v. Mabry*, 139 Ala. 217, 35 So. 698 (1903).

APPENDIX C

**EXCERPT FROM APPELLEES' BRIEF
IN OPPOSITION TO PACIFIC MUTUAL'S
APPLICATION FOR REHEARING**

Pacific Mutual had the opportunity to capitalize on all these procedural safeguards. The trial court prepared a *Hammond* opinion in which it noted that the jury's verdict was neither flawed nor excessive in view of the evidence of intentional, malicious, gross and oppressive fraud that was presented at trial. This Court's affirmation of the trial court's order was correct and, according to the law, Mrs. Haslip's award of punitive damages does not indicate a lack of fundamental fairness. "Some discretion must be afforded to juries to assess punitive damages as they see fit." *Tapley*, at 377. The plaintiff is entitled to his/her due process of law!

In view of the grossly fraudulent conduct committed by the defendants in this case, the imposition of \$1,040,000 in punitive damages was fitting; indeed, it will serve as punishment and the useful function of deterring others similarly situated from engaging in egregious conduct.

APPENDIX D

**STATES ALLOWING PUNITIVE DAMAGES
ON A RESPONDEAT SUPERIOR BASIS**

1. Alabama	<i>Standard Oil Co. of Kentucky v. Gunn</i>	234 Ala. 598, 176 So. 332 (1937)
2. Arizona	<i>Western Coach Corp. v. Vaughn</i>	9 Ariz. App. 336, 452 P.2d 177 (1969)
3. Arkansas	<i>Miller v. Blanton</i>	213 Ark. 246, 210 S.W.2d 293 (1948)
4. Delaware	<i>Ford v. Charles Warner Co.</i>	15 Del. (Marv.) 88, 37 A. 39 (1893)
5. Georgia	<i>Atlantic Greyhound Corp. v. Austin</i>	72 Ga. App. 289, 33 S.E.2d 718 (1945)
6. Indiana	<i>Hibbscham Pontiac, Inc. v. Batchelor</i>	266 Ind. 310, 362 N.E.2d 845 (1977)
7. Kansas	<i>Wheeler & Wilson Manufacturing Co. v. Boyce</i>	36 Kan 350, 13 P. 609 (1887)

8. Kentucky *Memphis & Cincinnati Packet Co. v. Nagel* 97 Ky. 9, 29 S.W. 743 (1895)
9. Maine *Goddard v. Grand Truck Railway of Canada* 57 Me. 202, 223-24 (1869)
10. Maryland *Embrey v. Holly* 442 A.2d 966 (Md. 1982)
11. Michigan *Lucas v. Michigan Central Railroad Co.* 98 Mich. 1, 56 N.W. 1039 (1893)
12. Mississippi *Sandifer Oil Co. v. Drew* 220 Miss. 609, 71 So.2d 752 (1954) D 2.
13. Missouri *Rinker v. Ford Motor Co.* 567 S.W.2d 655 (Mo. App. 1978)
14. Montana *Rinkman v. Safeway Stores* 124 Mont. 451, 227 P.2d 607 (1951)
15. North Carolina *Clemmons v. Life Insurance Co. of Georgia* 274 N.C. 416, 163 S.E.2d 761 (1968)

16. Oklahoma *Kurn v. Radencic* 193 Okla. 126, 141 P.2d 580 (1943)
17. Oregon *Stroud v. Denny's Restaurant, Inc.* 271 Ore. 430, 532 P.2d 790 (1975)
18. Pennsylvania *Chuy v. Philadelphia Eagles Football Club* 595 F.2d 1265, 1278 (3d Cir. (1979)
19. South Carolina *Beauchamp v. Winnsboro Granite Corp.* 113 S.C. 522, 101 S.E. 856 (1920) D 3.
20. Tennessee *Odum v. Gray* 508 S.W.2d 526, 533 (Tenn. 1974)

APPENDIX E

PUNITIVE DAMAGES CASES

CASE NAME	PUNITIVE DAMAGES	COURT ACTION
ALABAMA CASES		
1. <i>Bowles v. Lowery</i> 5 Ala. 555 (1912)	\$5,000	<i>Reversed and remanded</i> The damage verdict as excessive.
2. <i>Gulf States Steel Co. v. Comstock</i> 17 Ala. App. 430 (1920)	\$500	<i>Remittitur for settlement for less than \$300 based on damage verdict.</i>
3. <i>Evers-Jordan Furniture Co. v. Hartzog</i> 237 Ala. 407 (1939)	\$500	Remittitur to \$250
4. <i>Alabama Music Co., Inc., et al. v. Emogean Nelson</i> 282 Ala. 517, 213 So.2d 250 (1968)	\$2,300	<i>Affirmed</i>

5. *Water Works and Sanitary Sewer Board of the City of Montgomery v. Camilla Webber Norman*
282 Ala. 41, 208 So.2d 788 (1968)
re'hrg denied
(April 4, 1968) *Affirmed*
6. *S.S. Kresge Co., d/b/a K-Mart v. Arien Ruby*
348 So.2d 484 (1977) *Affirmed*
7. *James D. Mathis v. Jim Skinner Ford, Inc., a corp., et al.*
351 So.2d 113 (1978) *Affirmed*
8. *Winn-Dixie Montgomery, Inc. v. B. Henderson*
353 So.2d 1380 (1977)
re'hrg denied
(Feb. 3, 1978) *Reversed and remanded*

9. *Robert F. Jakob v. First Alabama Bank of Montgomery*
361 So.2d 1017 (1978)
re'hrg denied
(Aug. 25, 1978) *Affirmed*
10. *Gulf Oil Corporation v. Spriggs Enterprises, Inc.*
388 So.2d 518 (1980) *Reversed and remanded*
11. *Record Data International, Inc., et al. v. Robert Clinton Nichols, etc., et al.*
381 So.2d 1 (1979)
Application for re'hrg overruled
(March 7, 1980) *Affirmed*
12. *Gulf Atlantic Life Insurance Company, a corporation v. Rosezenna Barnes*
405 So.2d 916 (1981) Remittitur of punitive damages in excess of \$100,000

13. *James H. Earnest v. Pritchett-Moore, Inc., et al.*
401 So.2d 752 (1981) *Affirmed* \$10,000
14. *Shiloh Construction Company, Inc., a Corporation v. Mercury Construction Corporation*
392 So.2d 809 (1980)
re'hrg denied
(Jan. 9, 1981) *Affirmed* \$559,966.60
15. *J.C. Jacobs Banking Co., a corp. v. W. Loy Campbell*
408 So.2d 834 (1981)
re'hrg denied
(Nov. 25, 1981) *Affirmed* \$2,000,000
16. *Glen Smothers, et al. v. Onie Speake, et al.*
420 So.2d 75 (1982) *Affirmed* \$10,000

17. *Charles Atkins, d/b/a Atkins Ford Sales v. Mark Steven Drake*
437 So.2d 469 (1983) *Affirmed* \$15,000
18. *Continental Assurance Company, a Corporation v. Freddie E. Kountz*
461 So.2d 892 (1984) *Affirmed* \$23,000
19. *Aetna Life Insurance Company v. Margaret W. Lavoie and Roger J. Lavoie, Sr.*
470 So.2d 1060 (1984) *Affirmed* \$3,500,000
20. *Osborne Truck Lines, Inc. and Samuel Dale Cartee v. Roba Mae Langston, a minor, etc., Osborne Truck Lines, Inc. et al. v. James Samuel Langston III, a minor, etc., Osborne Truck Lines Inc., et al. v. Tommy Whitten*
454 So.2d 1317 (1984) *Affirmed* \$2,500,000

21. <i>David R. Todd v. United Steelworkers of America, AFL-CIO-CLC, an unincorporated association</i> 441 So.2d 889 (1983) (as amended Feb 8, 1984)	\$2,000,000	Remittitur of all damages in excess \$26,131
22. <i>National Security Fire & Casualty Company, et al. v. Bowen</i> 447 So.2d 133 (1983) <i>re'hrg denied</i> (Mar. 2, 1984)	\$1,500,000	<i>Affirmed</i>
23. <i>Nathan Raley and Nell Raley v. Citibank of Alabama/Andalusia</i> 474 So.2d 640 (1985)	\$90,000	<i>Affirmed</i>
24. <i>Clayton Shrout v. Bobby D. Thorsen</i> 470 So.2d 1222 (1985)	\$3,000,000 punitive \$40,000 compensatory	<i>Affirmed</i>

25. <i>American Pioneer Life Insurance Company and American Pioneer Corporation v. Fred C. Sandlin, Jr., as Executor of the estate of E. Kenneth Ayres, deceased</i> 470 So.2d 657 (1985)	\$3,000,000 punitive \$100,000 compensatory	<i>Affirmed</i>
26. <i>Alabama Farm Bureau Mutual Casualty Insurance Company, Inc. v. John K. Brewton and Shirley C. Brewton</i> 517 So.2d 599 (1987)	\$10,000	<i>Reversed</i>
27. <i>Mary Nell Hollis, Administratrix of the Estate of Joe Solomon Stokes v. Douglas Lee Scott</i> 518 So.2d 576 (1987)	\$1,000,000	<i>Affirmed</i>
28. <i>Black Belt Wood Company, Inc. v. Sesson. et al.</i> 514 So.2d 1249 (1987)	\$3,500,000	<i>Affirmed</i>

29. <i>Baldwin Mutual Ins. Co., a Corporation, and Frank B. Turner, an Individual v. Richard M. Brantley</i> 518 So.2d 32 (1987)	\$50,000	<i>Affirmed</i>
30. <i>Aetna Life Insurance Co. v. Margaret W. Lavoie and Roger J. Lavoie, Sr.</i> 505 So.2d 1050 (1987)	\$3,500,000	Remittitur of \$3,000,000
31. <i>Richard E. Kabel v. Myrtle M. Brady</i> 519 So.2d 912 (1987)	\$162,500	<i>Affirmed</i>
32. <i>Buford Whitt V. Sally Jones Hulsey, et al.</i> 519 So.2d 901 (1987)	\$14,500	<i>Affirmed</i>

-E 8-

33. <i>Herman Ensor and Ensor, Baccus & Williamson, P.A. v. Misty Wilson, a minor, who sues by and through her next friend and natural father, Robert Wilson</i> 519 So.2d 1244 (1987)	\$2,500,000	<i>Affirmed</i>
34. <i>Southern Life and Health Insurance Company v. Robert C. Smith, Jr. v. Southern Life and Health Insurance Company</i> 518 So.2d 77 (1987)	\$35,000	<i>Affirmed</i>
35. <i>City Bank of Alabama and Guy Sutterer v. Robert Eskridge</i> 521 So.2d 931 (1988)	\$62,500	<i>Affirmed</i>

-E 9-

36. *Alabama Power Company v. Kay Capps, administratrix of the estate of Richard D. Capps, deceased*
519 So.2d 1328 (1988) \$500,000 *Affirmed*
37. *Fruehauf Corporation v. Donnell Welch and Kenworth of Dothan, Inc.*
519 So.2d 502 (1988) \$100,000 *Affirmed*
Punitive damages are in the discretion of the jury

CASE NAME	PUNITIVE DAMAGES	COURT ACTION
CALIFORNIA CASES:		
<i>Morris v. Standard Oil Co.</i> 188 Cal. 468 (1922)	\$ 25,000	Remand for new trial re damages; excessive.
<i>Wilkinson v. Singh</i> 93 Cal.App. 37 (1928)	1,500	Remanded for new trial unless \$300.00.
<i>Livesey v. Stock</i> 208 Cal. 315 (1929)	50,000	New trial ordered unless remitted for \$10,000.
<i>Booth v. Peoples Finance, etc. Co.</i> 124 Cal.App. 131 (1932)	1,500	Remanded for new trial unless remitted for \$500.
<i>Washer v. Bank of America National Trust & Sav. Assoc.</i> 87 Cal.App.2d 501 (1948)	80,000	Reversed by trial judge on jnov; affirmed.
<i>Finney v. Lockhart</i> 35 Cal.2d 161 (1950)	2,000	<i>Affirmed.</i>

<i>Luke v. Mercantile Acceptance Corp.</i> 111 Cal.App.2d 431 (1952)	2,500	Retrial ordered on issue of punitive damages.
<i>Larrick v. Gilloon</i> 176 Cal.App.2d 408 (1959)	10,000	Upheld.
<i>DiGiorgio Fruit Corp. v. AFL-CIO</i> 215 Cal.App.2d 560 (1963)	50,000	Upheld.
<i>Toole v. Richardson-Merrell, Inc.</i> 251 Cal.App.2d 689 (1967)	500,000	New trial ordered unless remitted to \$250,000.
<i>Oakes v. McCarthy Co.</i> 267 Cal.App.2d 231 (1968)	77,500	Trial judge reduced to \$59,300; affirmed.
<i>Cunningham v. Simpson</i> 1 Cal.3d 301 (1969)	25,000 Unsegregated	Unsegregated damages excessive; remand for new trial.
<i>Ferraro v. Pacific Finance Corp.</i> 8 Cal.App.3d 339 (1970)	33,000	<i>Affirmed.</i>

-E 12-

<i>Fletcher v. Western National Life Ins. Co.</i> 10 Cal.App.3d 376 (1970)	640,000	Reduced to \$180,000.
<i>Wetherbee v. United Ins. Co.</i> 18 Cal.App.3d 266 (1971)	500,000	Reduced to \$200,000.
<i>Forte v. Nolf</i> 25 Cal.App.3d 656 (1972)	Unsegregated Damages	Remand on issue of damages; \$20,000 punitives excessive.
<i>Field Research Corp. v. Patrick</i> 30 Cal.App.3d 603 (1973)	150,000	Upheld.
<i>Schroeder v. Auto Driveaway Co.</i> 11 Cal.3d 908 (1974)	10,000	Upheld.
<i>Bertero v. National General Corp.</i> 13 Cal.3d 43 (1974)	625,000	<i>Affirmed</i> as proper.
<i>Roemer v. Retail Credit Co.</i> 44 Cal.App.3d 926 (1975)	250,000	<i>Affirmed</i>

-E 13-

<i>Farmy v. College Housing, Inc.</i> 48 Cal.App.3d 166 (1975)	45,000	Trial court reversed damages; insufficient evidence for punitive.
<i>Beck v. State Farm Mut. Auto Ins. Co.</i> 54 Cal.App.3d 347 (1976)	75,000	Trial judge denied jury; appellate court modified to strike all punitives.
<i>Allard v. Church of Scientology</i> 58 Cal.App.3d 439 (1976)	250,000	Reduced by appellate court to \$50,000.
<i>Weisenburg v. Molina</i> 58 Cal.App.3d 478 (1976)	28,240.18	<i>Affirmed.</i>
<i>Merlo v. Standard Life & Acc. Ins. Co.</i> 59 Cal.App.3d 5 (1976)	500,000	Reversed as excessive.
<i>Zhadan v. Downtown L.A. Motors</i> 66 Cal.App.3d 481 (1976)	175,000 first trial	Trial judge ordered new trial unless remitted to \$50,00; plaintiff did not remit. (App. Ct. affirmed trial judge.)

-E 14-

<i>Little v. Stuvvesant Life Ins. Co.</i> 67 Cal.App.3d 451 (1977)	2,500,000	Appellate court remanded for new trial unless reduced to \$250,000.
<i>Henderson v. Scurity National Bank</i> 72 Cal.App.3d 764 (1977)	125,000	Reversed punitive award due to insufficient evidence; affirmed.
<i>Neal v. Farmers Insurance Exchange</i> 21 Cal.3d 910 (1978)	1,518,637	Reduced to \$740,000.
<i>Walker v. Signal Companies, Inc.</i> 84 Cal.App.3d 982 (1978)	215,000	<i>Affirmed.</i>
<i>Grimshaw v. Ford Motor Company</i> 119 Cal.App.3d 757 (1978)	125,000,000	Reduced by trial court to 3.5 million; <i>affirmed.</i>
<i>Egan v. Mutual of Omaha Ins. Co.</i> 24 Cal.3d 809 (1979)	5,000,000	Reversed as excessive.
<i>Agarwal v. Johnson</i> 25 Cal.3d 932 (1979)	47,000	<i>Affirmed.</i>

-E 15-

<i>Bindrim v. Mitchell</i> 92 Cal.App.3d 61 (1979)	25,000	<i>Affirmed.</i>
<i>Delos v. Farmers Insurance Group, Inc.</i> 93 Cal.App.3d 642 (1979)	4,000,000	Trial court ordered new trial unless remitted to \$350,000; affirmed on appeal.
<i>Zhadan v. Downtown L.A. Motors</i> 100 Cal.App.3d 821 (1979)	90,000 second trial	Damages in second trial affirmed on appeal.
<i>Miller v. Elite Ins. Co.</i> 100 Cal.App.3d 739 (1980)	150,000	<i>Affirmed.</i>
<i>Rosener v. Sears, Roebuck & Co.</i> 110 Cal.App.3d 740 (1980), appeal dismissed, 450 U.S. 1051 (1981)	10,000,000	Remand for new trial unless remitted for \$2.5 million.
<i>Schomer v. Smidt</i> 113 Cal.App.3d 828 (1980)	16,000	<i>Affirmed.</i>

<i>Pistorius v. Prudential Ins. Co.</i> 123 Cal.App.3d 541 (1981)	1 million	<i>Affirmed.</i>
<i>Chodos v. Insurance Co. of North America</i> 126 Cal.App.3d 86 (1981)	200,000	<i>Affirmed.</i>
<i>Godfrey v. Steinpress</i> 128 Cal.App.3d 154 (1982)	60,000	<i>Affirmed.</i>
<i>Austero v. Washington National Ins. Co.</i> 132 Cal.App.3d 408 (1982)	200,000	<i>Affirmed.</i>
<i>Carol Burnett v. National Enquirer, Inc.</i> 144 Cal.App.3d 991 (1983)	1.3 million	Trial court remitted to \$750,000. Appellate court remanded for new trial unless remitted to \$150,000.
<i>Vossler v. Richards Manufacturing Co.</i> 143 Cal.App.3d 952 (1983)	500,000	<i>Affirmed.</i>
<i>Krusi v. Bear Stearns & Co.</i> 144 Cal.App.3d 664 (1983)	50,000	Remanded.

<i>Seaman's Direct Buying Service, Inc. v. Standard Oil Co.</i> 36 Cal.3d 752 (1984)	11 million	Trial judge ordered new trial unless remitted to 7 million; underlying judgments reversed by appellate court for retrial.
<i>Moore v. American United Life Insurance Co.</i> 150 Cal.App.3d 610 (1984)	2.5 million	<i>Affirmed.</i>
<i>Betts v. Allstate Insurance Co.</i> 154 Cal.App.3d 688 (1984)	3 million	<i>Affirmed.</i>
<i>Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.</i> 155 Cal.App.3d 381 (1984)	80,000	<i>Affirmed.</i>
<i>Fleming v. Safeco Insurance Co.</i> 160 Cal.App.3d 31 (1984)	116,000	<i>Affirmed.</i>
<i>Goshgarian v. George</i> 161 Cal.App.3d 1214 (1984)	15,000	Vacated by appellate court unless remitted to \$7,500.

<i>Sanchez-Corea v. Bank of America</i> 38 Cal.App.3d 982 (985)	1 million	Trial judge ordered new trial; Supreme Court reversed order.
<i>Sprague v. Equifax Inc.</i> 166 Cal.App.3d 1012 (1985)	5 million	Trial judge ordered new trial unless remitted to 1 million; appellate court affirmed trial judge.
<i>Jahn v. Brickey</i> 168 Cal.App.3d 399 (1985)	250,000	Trial judge ordered new trial unless remitted to \$100,000; appellate court affirmed trial court.
<i>Wayte v. Rollins International, Inc.</i> 169 Cal.App.3d 1 (1985)	1.5 million	Remitted to \$308,000.
<i>Frazier v. Metropolitan Life Ins. Co.</i> 169 Cal.App.3d 90 (1985)	8 million	Trial court remitted to 2 million; appellate court vacated entirely.
<i>Greenfield v. Spectrum Investment Corp.</i> 174 Cal.App.3d 111 (1985)	442,500	Trial judge ordered new trial unless remitted to \$215,000; appellate court reinstated judgment because of failure to state reasons for new trial.

<i>California Shoppers, Inc. v. Royal Globe Insurance Co.</i> 175 Cal.App.3d 1 (1985)	2 million	judgment granted by trial judge; affirmed by appellate court.
<i>Troensegaard v. Silvercrest Industries, Inc.</i> 175 Cal.App.3d 218 (1985)	55,000	Punitive damages vacated.
<i>Ball v. Posey</i> 176 Cal.App.3d 1209 (1986)	40,000	<i>Affirmed.</i>
<i>Ramona Manor Convalescent Hospital v. Care Enterprises</i> 177 Cal.App.3d 1120 (1986)	2.5 million	Reversed for retrial.
<i>Pusateri v. E.F. Hutton & Co., Inc.</i> 180 Cal.App.3d 247 (1986)	160,000	<i>Affirmed.</i>
<i>Campbell v. McClure</i> 182 Cal.App.3d 806 (1986)	100,000	<i>Affirmed.</i>

<i>Dugan v. Hasso</i> 185 Cal.App.3d 1184 (1986)	1.1 million	Reversed for retrial.
<i>Flyer's Body Shop Profit Sharing Plan v. Ticor Title Insurance Co.</i> 185 Cal.App.3d 1149 (1986)	250,000	Vacated on appeal.
<i>Travelers Insurance Co. v. Leshner</i> 187 Cal.App.3d 169 (1986)	1.5 million	Vacated on appeal.

UNPUBLISHED OPINIONS (CALIFORNIA):

<i>Rosendin v. Avco Lycoming Div.</i> No. 202, 715 (Super. Ct. Santa Clara County, Cal. June 7, 1972)	10 1/2 million	Motion for new trial granted; punitives excessive.
<i>Sullivan v. Kaiser Foundation Health Plan, Inc.</i> , No. 740, 729 (Super. Ct. San Diego County, Cal. September 26, 1983)	400,000	Motion for new trial granted on issue of punitive damages only.

<i>Baysinger v. Pacific Mutual Life Ins. Co.</i> No. 299656 (Super Ct. Sacramento County, Cal. October 24, 1983)	400,000	Trial court reduced to \$250,000.
<i>Satalich v. State Farm Mutual Auto Ins. Co.</i> , No. 31-76-01 (Super. Ct. Orange County, Cal. April 9, 1984)	1,007,000	Case settled with motion for new trial and jnov pending.
FEDERAL CASES:		
<i>Roginsky v. Richardson-Merrell, Inc.</i> 378 F.2d 832 (2d Cir. 1967)	100,000	Award reversed on appeal.
• <i>Gillham v. Admiral Corp.</i> 523 F.2d 102 (6th Cir. 1975)	100,000	Trial court granted jnov to set aside damages; reversed by 6th Cir.
<i>Johnson v. Husky Industries, Inc.</i> 536 F.2d 645 (6th Cir. 1976)	212,500	Reversed: insufficient evidence under Tennessee law to submit issue of punitive damages to jury.

<i>Thomas v. American Cystoscope Makers, Inc.</i> 414 F.Supp. 255 (E.D. Pa. 1976)	200,000	Trial judge granted jnov: punitive damage award reversed.
<i>McIntyre v. Everest & Jennings, Inc.</i> 575 F.2d 155 (8th Cir. (1978)	45,000	Vacated by trial judge; 8th Cir. affirmed.
<i>Kicklighter v. Nails by Jannee, Inc.</i> 616 F.2d 734 (5th Cir. 1980)	60,000	Trial judge granted jnov to set aside; 5th Cir. affirmed.
<i>Maxey v. Freightliner Corp.</i> 625 F.2d 395 (5th Cir. 1980)	10 million	Trial judge set aside punitive damage award; affirmed by 5th Cir.; rehearing by full court resulted in remand on ancil- lary issue.
• <i>Dorsey v. Honda Motor Co.</i> 655 F.2d 650 (5th Cir. 1981)	5 million	5th Cir. affirmed jury award.

OTHER STATE CASES:

<i>Ellis v. Golconda Corp.</i> 352 So.2d 1221 (Fla. Dist. Ct. App. 1977)	70,000	Reversed; insufficient evidence.	-E 24-
<i>Newding v. Kroger Co.</i> 554 S.W.2d 15 (Tex. Civ. App. 1977)	60,000	Trial court granted jnov setting aside punitive damages; affirmed.	
<i>Rinker v. Ford Motor Company</i> 567 S.W.2d 655 (Mo. Ct. App. 1978)	460,000	No opinion as to judgment amount.	
<i>Sturm, Ruger & Co. v. Day</i> 594 P.2d 38 (Alaska 1979); modified 615 P.2d 621 (Alaska 1980); on rehearing 627 P.2d 204 (Alaska 1981)	2.9 million	Alaska Supreme Court remanded for new trial; on rehearing approved entry of remitted \$500,000.	
<i>Cantrell v. Amarillo Hardware Co.</i> 602 P.2d 1326 (Kan. 1979)	18,500	<i>Affirmed.</i>	

<i>Gryc v. Dayton-Hudson Corp.</i> 297 N.W. 727 (Minn. 1980)	1 million	<i>Affirmed.</i>	-E 25-
<i>Wussow v. Commercial Mechanisms, Inc.</i> 293 N.W.2d 897 (Wis. 1980)	70,000	<i>Affirmed.</i>	
<i>Hall v. Consolidated Edison Corp.</i> 104 Misc.2d 565, 428 N.Y.S.2d 837 (Sup. Ct. 1980)	5 million	Reversed unless remitted to \$50,000.	
<i>United School Dist. No. 490 v. Celotex Corp.</i> 629 P.2d 196 (Kan. Ct. App. 1981)	600,000	<i>Affirmed.</i>	
<i>Leichtamer v. American Motors Corp.</i> 424 N.E.2d 568 (Ohio 1981)	1.1 million	<i>Affirmed.</i>	
<i>Moore v. Remington Arms Co.</i> 427 N.E.2d 608 (Ill. 1981)	85,000	Reversed.	

*Forrest City Mach. Works, Inc.
v. Aderhold*
616 S.W.2d 720 (Ark. 1981) 500,000 Reversed.

*Harley-Davidson Motor Co.
v. Wisniewski*
437 A.2d 700 (Md. Ct.
Spec. App. 1981) 1.9 million Vacated.

*Rawlings Sporting Goods Co.
v. Daniels*
619 S.W.2d 435 (Tex. Civ.
App. 1981) 750,000 Affirmed.

-E 26-

UNPUBLISHED OPINIONS (OTHER):

Qstopowitz v. Wm. S. Merrell Co.
N.Y.L.J. January 11, 1967 850,000 New trial ordered unless
Sup. Ct., Westchester County, N.Y.) remitted to \$100,000.
(cited in *Roginsky, supra*,
378 F.2d at 834, n. 3)

Stambaugh v. Intl. Harvester Co.
No. 78-L-2775 (Cir. Ct., St.
Clair Cty., Ill., October 26, 1979) 15 million Trial judge remitted to 7.5
million.

Ashland Oil Co. v. BiPetro, Inc.
S.D. Ill. (November 1980) 300 million Reversed.

Pring v. Penthouse Magazine
D. Wyo. (March 1981) 25 million Reduced to 12.5 million.
(*rev'd on other grounds*
10th Cir., November 5, 1982)

-E 27-

See also Wheeler, "The Constitutional Case For Reforming Punitive Damages Procedures,"
69 Virginia Law Review 269, 1983. The author notes at 288:

"... out of forty-five reported cases decided by the New York appellate
courts in which the court either determined whether there was sufficient
evidence of malice to support any punitive award or determined whether
the jury had awarded an excessive amount of punitive damages, thirty-
five punitive damages cases were remitted or reversed." (Footnote
omitted.)

APPENDIX F

**ALABAMA STATUTES LIMITING
THE AMOUNT OF PUNITIVE
DAMAGES RECOVERABLE**

Code of Alabama 5-19-19 [Charge of Interest in excess of maximum, except bona fide error or accident, double damages or ten times the excess charge].

Code of Alabama 6-6-314 [unlawful detainer, double damages].

Code of Alabama 8-19-10(a)(2) [using deceptive trade practices in dealings with consumers, treble damages].

Code of Alabama 8-19-5(19) and (20) [using deceptive trade practices in dealings with nonconsumers, treble damages].

Code of Alabama 37-2-18 [liability for excessive rates charged by common carriers, treble damages].

Alabama Rules of Appellate Procedure, Rule 38 [frivolous appeals in civil cases, double costs].

**CALIFORNIA STATUTES LIMITING
THE AMOUNT OF PUNITIVE
DAMAGES RECOVERABLE**

1. Code of Civil Procedure Section 732 [waste of property, treble damages].
2. Code of Civil Procedure Section 733 [trespass, treble damages].
3. Code of Civil Procedure Section 1174 [unlawful detainer, treble damages].
4. Civil Code Section 1716 [solicitation of payment for goods or services not ordered, treble damages].
5. Civil Code Section 1745 [wilful violation of sale of fine prints law, treble damages].
6. Civil Code Section 1747.50 [wilful failure to correct credit card billing error, treble damages].
7. Civil Code Section 1785.31 [violation of Consumer Credit Reporting Law, not less than \$100 nor more than \$5,000].
8. Civil Code Section 1787.3 [Consumer Credit Denial, \$10,000 in individual action, lesser of \$500,000 or 1% of net worth in class action].
9. Civil Code Section 1812.19 [wilful violations of retail installment sale finance charge regulations, treble damages].
10. Civil Code Section 1812.31 [violation of equal credit for women law, \$10,000 in individual action, lesser of \$100,000 or 1% of defendant's net worth in a class action].

11. Civil Code Section 1812.62 [violation of Dance Studio's Services Act, treble damages].
12. Civil Code Section 1812.94 [violation of Health Studio's Services Act, treble damages].
13. Civil Code Section 1916.3 (West 1954) [violation of usury law, treble damages].
14. Probate Code Section 612 [double damages for embezzlement or fraudulent sale of decedent's property].
15. Business and Professions Code Section 16750 [violation of Unfair Weight Act, treble damages].
16. Business and Professions Code Section 17082 [violation of unfair trade practices, treble damages].
17. Health and Safety Code Section 25359 [failing, without sufficient cause, to report an unauthorized release of a hazardous substance, treble damages].

MAR 9 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1279

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
 to the Supreme Court of Alabama

BRIEF AMICI CURIAE FOR THE
 AMERICAN COUNCIL OF LIFE INSURANCE AND
 HEALTH INSURANCE ASSOCIATION OF AMERICA
 IN SUPPORT OF THE PETITION

Of Counsel:

RICHARD E. BARNSBACK
 PHILLIP E. STANO
 AMERICAN COUNCIL
 OF LIFE INSURANCE
 1001 Pennsylvania Ave., N.W.
 Washington, D.C. 20004
 (202) 624-2183

JOE W. PEEL
 THERESA L. SOROTA
 HEALTH INSURANCE
 ASSOCIATION OF AMERICA
 1025 Connecticut Ave., N.W.
 Washington, D.C. 20036
 (202) 223-7822

ERWIN N. GRISWOLD
 (Counsel of Record)
 PATRICIA A. DUNN
 JILL J. BEAVER
 JONES, DAY, REAVIS &
 POGUE
 1450 G Street, N.W.
 Washington, D.C. 20005
 (202) 879-3939

Counsel for the Amici

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment imposes limitations on a jury's standardless discretion to assess punitive damages and to determine the severity of punishment in civil cases involving private parties?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTERESTS OF THE AMICI	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	5
WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IMPOSES LIMITATIONS ON A JURY'S DISCRETION TO ASSESS PUNITIVE DAMAGES AND TO DE- TERMINE THE SEVERITY OF PUNISHMENT IN CIVIL CASES INVOLVING PRIVATE PAR- TIES RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE	5
A. The Explosive Growth In Both The Number And Size Of Punitive Damages Awards, Ren- dered In The Absence Of Constitutional Safe- guards, Is Compelling Confirmation Of The Need For This Court's Review	6
B. Only This Court, Applying The Precepts Of Due Process, Can Define The Constitutional Bound- aries Of Punitive Damages Law	8
1. A Jury's "Standardless Discretion" To Award And To Assess Punitive Damages Is Inconsistent With Due Process	9
2. Limited Judicial Review Of Excessive Puni- tive Damages Awards Does Not Cure The Constitutional Flaws In Punitive Damages Law	14
3. Imposing Due Process Limitations On Puni- tive Damages Law Will Not Impair The States' Interests In Compensating Victims And Punishing Wrongdoers	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	14
<i>Aetna Life Insurance Co. v. Lavoie</i> , 475 U.S. 813 (1986)	2, 5
<i>Bankers Life & Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988)	passim
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980)	17
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	13
<i>Browning-Ferris Industries v. Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989)	passim
<i>Campbell v. Burns</i> , 512 So. 2d 1341 (Ala. 1987)	17
<i>Carnival Cruise Lines, Inc. v. Goodin</i> , 535 So. 2d 98 (Ala. 1988)	16
<i>Central Alabama Elec. Cooperative v. Tapley</i> , 546 So. 2d 371 (Ala. 1989)	13
<i>Charter Hosp. v. Weinberg</i> , 1990 Ala. LEXIS 17 (Ala. Jan. 12, 1990)	10, 16, 17
<i>Chicago, Milwaukee & St. Paul Railway Co. v. Polt</i> , 232 U.S. 165 (1914)	15
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	13
<i>Daniels v. Williams</i> , 474 U.S. 27 (1986)	9
<i>Day v. Woodworth</i> , 13 How. 363 (1851)	6
<i>Dependable Insurance Co. v. Kirkpatrick</i> , 514 So. 2d 804 (Ala. 1987)	16
<i>Downey Savings & Loan Ass'n v. Ohio Casualty Insurance Co.</i> , 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), cert. denied, 108 S. Ct. 2023 (1988)	7
<i>Dunkin v. Smith</i> , 502 So. 2d 705 (Ala. 1987)	16
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	passim
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	12
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	9, 12
<i>Hammond v. City of Gadsden</i> , 493 So. 2d 1374 (Ala. 1986)	passim
<i>Hawkins v. Allstate Insurance Co.</i> , 152 Ariz. 490, 733 P.2d 1073, cert. denied, 484 U.S. 874 (1987)	7
<i>Hayes v. Payne</i> , 523 So. 2d 333 (Ala. 1987)	16
<i>In re Winship</i> , 397 U.S. 358 (1970)	12

TABLE OF AUTHORITIES—Continued

	Page
<i>Industrial Chemical & Fiberglass Corp. v. Chandler</i> , 547 So. 2d 812 (Ala. 1989)	18
<i>International Brotherhood of Elec. Workers v. Foust</i> , 442 U.S. 42 (1979)	7, 11
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)	12
<i>L.W. Johnson & Associates, Inc. v. Rivers Construction Co.</i> , 532 So. 2d 618 (Ala. 1988)	16
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	12
<i>Missouri Pacific Railway Co. v. Tucker</i> , 230 U.S. 340 (1913)	15
<i>Rinaldi v. Yeager</i> , 384 U.S. 305 (1966)	14
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982)	9, 13, 14
<i>Sharp Electronics Corp. v. Shaw</i> , 524 So. 2d 586 (Ala. 1987)	16
<i>Shelley v. Kraemer</i> , 334 U.S. 1 (1948)	14
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974)	10, 12
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	passim
<i>Southwestern Telegraph & Telephone Co. v. Danaher</i> , 238 U.S. 482 (1915)	15
<i>St. Louis, Iron Mountain & Southern Railway Co. v. Williams</i> , 251 U.S. 63 (1919)	15
<i>Super Valu Stores, Inc. v. Peterson</i> , 506 So. 2d 317 (Ala. 1987)	17
<i>T.D.S., Inc. v. Shelby Mutual Insurance Co.</i> , 760 F.2d 1520 (11th Cir.), modified in part, 769 F.2d 1485 (11th Cir. 1985)	7
<i>Trawick v. Michaels of Oregon Co.</i> , No. 88-C-413-N (M.D. Ala.)	18
<i>United American Insurance Co. v. Brumley</i> , 542 So. 2d 1231 (Ala. 1989)	7, 17
<i>United States v. Halper</i> , 109 S. Ct. 1892 (1989)	13
<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982)	10
<i>Vitek v. Jones</i> , 445 U.S. 480 (1980)	9
<i>Waters-Pierce Oil Co. v. Texas</i> , 212 U.S. 86 (1909)	15
<i>Woodby v. INS</i> , 385 U.S. 276 (1966)	14
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	12

TABLE OF AUTHORITIES—Continued

<i>Statutes</i>	Page
Ala. Code § 6-11-20 (1989)	17
Ala. Code § 6-11-21 (1989)	17
Ala. Code § 6-11-23 (1989)	17
Ala. Code § 27-1-12 (1986)	16
Ala. Code § 27-12-17 (1986)	16
Ala. Code § 27-12-23 (1986)	16
 <i>Miscellaneous</i>	
American College of Trial Lawyers, <i>Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice</i> (1989)	19
Jeffries, <i>A Comment on the Constitutionality of Punitive Damages</i> , 72 Va. L. Rev. 139 (1986)	6
1 L. Schlueter & K. Redden, <i>Punitive Damages</i> § 9.3(A) (1989)	7
M. Peterson, S. Sarma, & M. Shanley, <i>Punitive Damages: Empirical Findings</i> (1987)	7
Nelson, <i>Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability</i> , 18 Forum 377 (1983)	6

**BRIEF AMICI CURIAE FOR THE
AMERICAN COUNCIL OF LIFE INSURANCE AND
HEALTH INSURANCE ASSOCIATION OF AMERICA
IN SUPPORT OF THE PETITION**

INTERESTS OF THE AMICI¹

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States, representing the interests of 616 member life insurance companies, 435 of which hold licenses to conduct insurance business in Alabama. The ACLI's members currently hold 95 percent of the life insurance in force in legal reserve life insurance companies in the United States and 92.6 percent of such insurance in Alabama. The Health Insurance Association of America ("HIAA") represents the interests of 320 member companies that write over 85 percent of the health insurance written by commercial insurance companies in the United States; approximately 230 of those members hold licenses in Alabama.

The central issue in this case—whether the Due Process Clause of the Fourteenth Amendment imposes limitations on a jury's discretion to award and assess punitive damages—is vitally important to the members of the ACLI and HIAA. In recent years, courts have permitted juries to punish insurance companies, through substantial punitive damages awards, in the absence of due process constraints and have deferred to those awards even though they are excessive and bear no relationship to the plaintiffs' injuries. These decisions, like the decision below, drastically and unpredictably enlarge the risks facing insurers, who must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance policies. Because of their genuine interest in the constitu-

¹ Counsel for both the Petitioner and the Respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

tionality of current punitive damages law, therefore, the ACLI and the HIAA have filed several *amici* briefs in this Court in cases involving this issue. See, e.g., *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

The ACLI and the HIAA thus file this brief to provide the Court with their unique perspectives, based on the experiences of their broad-based constituencies, on the constitutionality of punitive damages law and to offer additional arguments that underscore the importance of this Court's review.

STATEMENT

1. Petitioner, Pacific Mutual Life Insurance Company ("Pacific Mutual"), provides life insurance, but not health insurance, to employees of Alabama municipalities (Pet. App. B2). In 1981, Lemmie Ruffin, a non-exclusive insurance agent—in essence, an independent contractor for a number of insurers—approached Roosevelt City (the "City") and offered to provide health and life insurance to its employees through Pacific Mutual (*id.* at B1-B2). Ruffin told the City clerk and other City employees that he was "with Pacific Mutual" (*id.* at B2). He did not tell them that he also wrote policies for Union Fidelity Life Insurance Company ("Union Fidelity") (*id.*). Nor did he tell them that only Union Fidelity—and not Pacific Mutual—could provide health insurance to municipal employees (*id.*).

After consulting with the City clerk and the City's employees, Ruffin submitted an insurance proposal to the City on Pacific Mutual letterhead (Pet. App. B2). That proposal stated that he would place the City employees' life insurance with Pacific Mutual and their health insurance with Union Fidelity (*id.*). In response to the City clerk's inquiries, Ruffin represented (untruthfully) that Union Fidelity was a subsidiary of Pacific Mutual (*id.*).

In August 1981, the City accepted Ruffin's proposal and began to collect, through payroll deductions, insurance premiums from its employees (Pet. App. B2). Each month, Ruffin submitted an invoice to the City clerk on Pacific Mutual letterhead (*id.*). Periodically, Ruffin personally collected the City's premium payments (*id.*), having arranged for all communications between the City and the insurers—including all premium payments—to be exchanged through him (*id.* at B3). Ruffin, however, never forwarded the City's premium payments to either Pacific Mutual or Union Fidelity (*id.*). Thus, in late 1981, unaware of Ruffin's scheme, Pacific Mutual and Union Fidelity independently cancelled the City employees' policies for nonpayment of premiums (*id.* at B2-B3). Although Ruffin received cancellation notices from the insurers (*id.* at A2), he did not notify the City employees of the lapse of their insurance (*id.* at B3) and, instead, continued to accept their premiums (*id.* at A2, B5).

In January 1982, after Union Fidelity cancelled the City employees' health insurance, Cleopatra Haslip incurred \$2,500 in hospital and medical expenses (Pet. App. B3). When the hospital could not confirm that Haslip had health insurance coverage through the City, it refused to discharge her from the hospital without a \$600 partial payment of her expenses (*id.*). She then learned, for the first time, that her health insurance had lapsed (*id.*). Based on Haslip's experience, other City employees discovered that, despite their payment of premiums, their health and/or life insurance had lapsed as well (*id.* at A4-A6).

2. Haslip and several other City employees sued Pacific Mutual and Ruffin, but not Union Fidelity, in Alabama state court for fraud (Pet. App. B3). In August 1987, the jury returned a verdict for the plaintiffs and awarded damages to each of them (*id.*). It awarded Haslip, in particular, \$1,040,000 in compensatory and punitive damages based on Ruffin's conduct (*id.*).

3. The trial court denied Pacific Mutual's motion for a new trial or for judgment notwithstanding the verdict

(Pet. App. A1). It concluded that the jury properly found that Ruffin was the agent of Pacific Mutual and that, under the doctrine of *respondeat superior*, Pacific Mutual was liable for his fraud (*id.* at A7-A8). It further concluded that the jury properly awarded punitive damages because Ruffin had “knowingly and intentionally committed fraud by collecting insurance premiums on cancelled policies and keeping the premiums for himself” (*id.* at A12). The court then declined to order a remittitur. Noting that the Alabama Supreme Court had outlined procedures for review of jury verdicts in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986),² it sustained the verdict because, in its view, “the conduct in this case evidenced intentional malicious, gross, or oppressive fraud” (*id.* at A14); the award was not excessive, even though it was “for a great amount of money” and even though the court “would in all likelihood have rendered a less[er] amount” (*id.* at A15); and the verdict was not based on “bias, passion, corruption, or other improper motive” (*id.*).

4. The Alabama Supreme Court affirmed. It agreed with the trial court that Pacific Mutual was liable for Ruffin’s fraud under the doctrine of *respondeat superior*. It concluded that Ruffin acted within the scope of his agency when he defrauded the City’s employees and that his acts were imputable to Pacific Mutual (Pet. App. B7-B9), even though Pacific Mutual does not write health insurance. The court rejected Pacific Mutual’s argument that Ruffin had acted on behalf of another principal when he committed the fraud and thus had “abandoned” his agency with Pacific Mutual (*id.* at B8).

The court then sustained the punitive damages award, rejecting Pacific Mutual’s arguments that the award was

² The *Hammond* decision requires trial courts to state for the record their findings of fact and conclusions of law regarding the excessiveness of jury awards and permits them to hold a post-trial, evidentiary hearing on that issue. *Id.* at 1379. *Hammond* further suggests that, in making this assessment, the court can consider such factors as the defendant’s culpability, the need for deterrence and the impact of the award on the parties. *Id.*

unconstitutional (Pet. App. B12-B13). It relied on this Court’s decision in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), to reject Pacific Mutual’s Eighth Amendment challenge; it relied on prior decisions of the Alabama Supreme Court to reject Pacific Mutual’s remaining constitutional challenges, including its due process challenge. The court noted that it had established certain “guidelines” for evaluating jury verdicts and protecting the due process rights of civil defendants (*id.* at B13, citing *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986)) and that the trial court had followed them. Thus, because “jury verdicts are presumed correct” (*id.*), the court affirmed the jury’s award.

Two justices dissented from the majority’s constitutional analysis. In their view, “the award of punitive damages in this case violate[d] [Pacific Mutual’s] due process rights under the Fourteenth Amendment” (Pet. App. B16).

REASONS FOR GRANTING THE WRIT

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IMPOSES LIMITATIONS ON A JURY’S DISCRETION TO ASSESS PUNITIVE DAMAGES AND TO DETERMINE THE SEVERITY OF PUNISHMENT IN CIVIL CASES INVOLVING PRIVATE PARTIES RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE

This Court has recognized that the constitutionality of current punitive damages law, under the Due Process Clause of the Fourteenth Amendment, is an “important issue[] which, in an appropriate setting, must be resolved.” *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986). This case presents a compelling setting for this Court to do so. Pacific Mutual timely raised its constitutional challenge to the assessment of punitive damages at every critical stage of the proceedings in the courts below; despite its challenges, the trial court permitted the jury to assess punitive damages against Pa-

cific Mutual with virtually no guidance as to either the propriety or amount of those damages; and the Alabama Supreme Court, with two Justices dissenting, declined to disturb the result of the jury's exercise of standardless discretion—the arbitrary punishment of an insurance company, without due process of law, based on the lapse of a health insurance policy that it did not write and based on the acts of a non-exclusive agent that it neither authorized nor condoned.

A. The Explosive Growth In Both The Number And Size Of Punitive Damages Awards, Rendered In The Absence Of Constitutional Safeguards, Is Compelling Confirmation Of The Need For This Court's Review

Current practices regarding punitive damages are neither time-honored nor logically related to traditional legal doctrines. See Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 140-46 (1986). "It scarcely needs repeating that punitive damages are not a 'favorite of the law.'" *Smith v. Wade*, 461 U.S. 30, 87 (1983) (Rehnquist, J., dissenting). They are an historical anomaly, transported from eighteenth century England and nurtured by early American courts as a means of compensating, in small amounts, victims of libel, slander and similar tortious conduct where the victims' injuries were intangible and largely immeasurable. See *Day v. Woodworth*, 13 Howard 363, 371 (1851); see generally Nelson, *Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability*, 18 Forum 377, 380-81 (1983).

From this small beginning, punitive damages awards have branched far beyond their origin in "insult" torts and far beyond the limits of their validity. Despite the steady expansion of the types of injuries, intangible or otherwise, for which the law now provides compensation, courts have nonetheless sanctioned a massive, and uncontrolled, expansion in both the frequency and size of punitive damages awards. Rather than confine these damages to certain intentional or malicious misconduct,

courts have sustained punitive damages awards in a broader spectrum of cases involving conduct that is, at most, very careless, grossly negligent or reckless—that is, conduct that "import[s] only a degree of negligence." *Smith v. Wade*, 461 U.S. at 61-62 (Rehnquist, J., dissenting); see *id.* at 38-41 & n.6; 1 L. Schlueter & K. Redden, *Punitive Damages* § 9.3(A), at 393-97 (1989). And they have sanctioned a wide range of results from juries who, left unguided, have exercised free reign to punish unpopular defendants with exorbitant punitive awards.³ These developments are not unique to Alabama; punitive damages awards in virtually all jurisdictions are, in Justice O'Connor's apt words, "skyrocketing." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, Stevens, JJ., concurring in part and dissenting in part); see generally M. Peterson, S. Sarma, & M. Shanley, *Punitive Damages: Empirical Findings* at 14, 22-24 (1987).

Members of this Court have on several occasions expressed concern about current punitive damages law. On two occasions, a majority of this Court has voted to prohibit, or substantially limit, awards of punitive damages in certain types of cases. See *International Brotherhood of Elec. Workers v. Foust*, 442 U.S. 42 (1979) (no punitive damages for union's breach of its duty of fair representation); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (no punitive damages in certain media defamation cases involving private plaintiffs). Chief Justice Rehnquist has expressed grave concerns that the imposition of punitive damages, based on varying standards of

³ The examples in the insurance field alone are staggering. See, e.g., *United American Ins. Co. v. Brumley*, 542 So. 2d 1231 (Ala. 1989) (\$1 million punitive award); *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 733 P.2d 1073, cert. denied, 484 U.S. 874 (1987) (\$3.5 million punitive award affirmed); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), cert. denied, 108 S. Ct. 2023 (1988) (\$5 million punitive award); *T.D.S., Inc. v. Shelby Mutual Ins. Co.*, 760 F.2d 1520 (11th Cir.) (\$2.1 million award affirmed), modified in part, 769 F.2d 1485 (11th Cir. 1985).

negligence, is accomplished without adequate procedural safeguards. See *Smith v. Wade*, 461 U.S. at 61-62 (Rehnquist, J., dissenting). Justice O'Connor, joined by Justice Scalia, has also observed that a jury's "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, Scalia, JJ., concurring). And, most recently, three other Justices of this Court, in addition to Justice O'Connor, expressed their views that the "skeletal guidance" provided to juries in assessing punitive damages poses serious due process concerns, at least in the absence of statutory guidelines. See *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring); *id.* at 2924 (O'Connor, Stevens, JJ., concurring in part and dissenting in part).

This case is an appropriate vehicle for the Court to address these due process concerns. None of the jurisdictional or prudential reasons that prompted this Court to "leave for another day" (*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 88 (O'Connor, Scalia, JJ., concurring)) the consideration of this issue in *Browning-Ferris*, *Crenshaw* and *Lavoie* exists in this case. Here, Pacific Mutual timely raised the constitutionality of punitive damages at each critical stage of the lower court proceedings and carefully preserved that issue for this Court's review. That review should be provided.

B. Only This Court, Applying The Precepts Of Due Process, Can Define The Constitutional Boundaries Of Punitive Damages Law

The decision below starkly reveals the constitutional flaws inherent in current punitive damages law. In this case, that law permitted a jury to decide arbitrarily to punish Pacific Mutual, based on the lapse of an insurance policy that it did not write and conduct that it did not know about, authorize or condone, and to determine the severity of that punishment with virtually no guidance

whatever. That same law permitted a reviewing court to sustain the jury's excessive punishment, even though it bore no rational relationship to Pacific Mutual's conduct and bore no proportionate relationship to any harm done. Because such standardless imposition of punishment flouts the very notion of constitutional due process—namely, "‘protection of the individual against arbitrary action’" (*Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citation omitted))—this Court should review the decision below to determine whether punitive damages procedures meet the constitutionally imposed "‘minimum requirements’" of due process. *Santosky v. Kramer*, 455 U.S. 745, 755 (1982), quoting *Vitek v. Jones*, 455 U.S. 480, 491 (1980).

1. A Jury's "Standardless Discretion" To Award And To Assess Punitive Damages Is Inconsistent With Due Process

"The idea that [due process requires that] a jury should be given guidance in its decisionmaking is . . . hardly a novel proposition." *Gregg v. Georgia*, 428 U.S. 153, 192-93 (1976). But punitive damages procedure, as it now exists, affords no intelligible standards for a jury charged with deciding whether to award punitive damages and, if so, in what amount. That procedure is, on its face, constitutionally deficient.

(a) Current punitive damages law leaves the decision to award such damages to the sole discretion of a jury that, based on a mere preponderance of the evidence, has found a civil defendant liable under a subjective standard that may range from "maliciousness" to some degree of "negligence." Exercising their "wholly standardless discretion" (*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 88 (O'Connor, Scalia, JJ., concurring)), juries "‘may or may not make such an award’" (*Smith v. Wade*, 461 U.S. at 52 (citation omitted)); they make that decision "guided by little more than an admonition to do what they think is best." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring). This "deep[] flaw" (*id.*) of punitive damages law subjects

defendants to the whims of a jury and exposes them to punitive damages awards "frequently based upon . . . caprice and prejudice." *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting).

This absence of discernible standards, moreover, forces civil defendants to speculate about the type of conduct that might subject them to punitive damages awards and about the likelihood that a jury will decide to impose such punishment. Thus, one jury may choose to punish a civil defendant with a substantial punitive award for "grossly negligent" conduct that a different jury, based on similar facts, would deem insufficiently offensive to warrant substantial, if any, punishment.⁴ This prospect is far afield from the due process requirement of "fair notice or warning" of punishable conduct. See *Smith v. Goguen*, 415 U.S. 566, 572 (1974); see also *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-500 (1982) ("quasi-criminal" ordinance with possible "prohibitory and stigmatizing effect may warrant a relatively strict [vagueness] test"); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2924 (O'Connor, Stevens, JJ., concurring and dissenting in part) (noting vagueness problems in the context of punitive damages law).

Equally deficient is the failure of current punitive damages law to define the parameters of the amount of punitive damages that a jury may award. "Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at

⁴ Such "shot in the dark" jury awards are common under a system that provides no standards to guide jurors. See *Charter Hosp. v. Weinberg*, 1990 Ala. LEXIS 17 (Ala. Jan. 12, 1990) (Houston, J., concurring specially). Under this system, two juries acting pursuant to substantially similar punitive damages instructions can reach drastically different results: "one jury awards \$21,130.86, which is 15½ times the compensatory damages, to punish and deter . . . ; and another awards \$2,490,000, which is 249 times the compensatory damages, to punish and deter . . . —for the same conduct." *Id.* (citations omitted).

87 (O'Connor, Scalia, JJ., concurring). On the contrary, jury discretion over the amounts of punitive damages "is limited only by the gentle rule that they not be excessive." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350. Thus, "[w]ithout statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring). This grant of "wholly standardless discretion to determine the severity of punishment" (*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 88 (O'Connor, Scalia, JJ., concurring)) results in wildly varying "windfall recoveries [that are] unpredictable and potentially substantial." *International Brotherhood of Elec. Workers v. Foust*, 442 U.S. at 50.

These flaws are plainly evident in this case. After finding Pacific Mutual liable under a liberal *respondeat superior* standard, the jury exercised its discretion to award punitive damages with little more guidance than to "do what you think is best." Told that, in its "discretion," it could award punitive damages, the jury penalized—and stigmatized—Pacific Mutual with an arbitrary award of punitive damages that it had no reason to expect. Left to its own devices to mete out the level of punishment after considering "the character and degree of the wrong . . . and the necessity of preventing similar wrongs," the jury punished Pacific Mutual in an amount in excess of \$1 million—an award 416 times Haslip's medical expenses. These standards, ill-defined at best, did nothing to protect Pacific Mutual from arbitrary action or to ensure the "fundamental fairness" that the Due Process Clause requires.

(b) This Court has not tolerated these constitutional infirmities in other contexts where juries have the power to mete out punishment. In the criminal context, for example, a jury can punish a defendant only after his

guilt has been proven beyond a reasonable doubt (*In re Winship*, 397 U.S. 358, 364 (1970))—a standard that stands in marked contrast to the preponderance of the evidence standard of liability in most civil cases. Criminal defendants, moreover, must receive fair notice of their punishment; unlike civil defendants in punitive damages cases, they need not speculate about the consequences of their conduct. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Smith v. Goguen*, 415 U.S. at 572-73; *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). And, while juries in criminal cases do, of course, exercise some discretion in determining the severity of punishment, that discretion is—unlike the discretion accorded civil juries in punitive damages cases—limited by objective guidelines, including maximum statutory penalties.⁵

This Court should not tolerate punishment, in the punitive damages law context, without comparable due process protections. Though nominally civil, punitive damages are functionally penal. See *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2932 (O'Connor, Stevens, JJ., concurring in part and dissenting in part) (“[t]he Court’s cases abound with the recognition of the penal nature of punitive damages”). “Punitive damages are awarded not to compensate for injury but, rather, ‘to punish reprehensible conduct and

⁵ In reviewing the role of the jury in criminal sentencing, this Court has emphasized the importance of providing guidance to protect against arbitrary and discriminatory sentences. See *Gregg v. Georgia*, 428 U.S. at 189 (“discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action”); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (the basic requirement of due process necessitates replacing “arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable” jury determinations). Although courts have traditionally provided guidance to juries assessing punishment in criminal contexts, they have provided no similar guidance—or, at least, no useful guidance—to juries vested with the power to assess punitive damages, despite the fact that this Court has also recognized the necessity of due process protections in civil litigation. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429, 433 (1982).

to deter its future occurrence.’” *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 87 (O'Connor, Scalia, JJ., concurring), quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350. They further few, if any, “legitimate nonpunitive governmental objectives.” *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979). That juries impose punitive damages in a civil action, rather than a criminal prosecution, neither changes their fundamentally penal character nor minimizes the need for constitutional protections. See *United States v. Halper*, 109 S. Ct. 1892, 1901 (1989); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981).

That the punitive award in this case was “penal” in a constitutional sense, so as to require enhanced procedural safeguards, is plain. Under Alabama law, punitive damages have no purpose other than to punish and deter. See, e.g., *Central Alabama Elec. Cooperative v. Tapley*, 546 So. 2d 371, 377 (Ala. 1989). Despite the penal, “quasi-criminal” character of punitive damages, none of the procedural safeguards mandated by due process accompanied the punitive award against Pacific Mutual. The jury penalized and stigmatized Pacific Mutual with a punitive award that it had no reason to expect; after all, Pacific Mutual did not even issue, much less cause the lapse of, the health insurance policy underlying Haslip’s action. The jury, moreover, punished Pacific Mutual without the protection of an elevated standard of proof, e.g., “clear and convincing evidence.” See *Santosky v. Kramer*, 455 U.S. at 756 (enhanced burden of proof is constitutionally required where proceedings threaten one of the parties with a significant stigma). It did so without the protection of standards limiting the level of punishment that it could inflict. And it did so not in a less prejudicial bifurcated trial, but in the same proceeding during which the jury decided Pacific Mutual’s liability.

Where a law gives a jury standardless discretion to award punitive damages, imposes no guidelines for assessing the level of punishment, and authorizes poten-

tially substantial and destructive awards, the fundamental requirements of due process are surely violated. See *Santosky v. Kramer*, 455 U.S. 745 (1982); *Woodby v. INS*, 385 U.S. 276 (1966); *Addington v. Texas*, 441 U.S. 418 (1979). The law of a state as developed by its courts is clearly "state action." *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948). There is no doubt that the states have wide powers in making rules for public safety and their general polity. But there surely comes a point when the fundamental protections of the Fourteenth Amendment must be recognized. Only this Court can finally determine when that point has been reached.⁶

2. Limited Judicial Review Of Excessive Punitive Damages Awards Does Not Cure The Constitutional Flaws In Punitive Damages Law

Under the punitive damages laws of most jurisdictions, juries can and do "award any amount of punitive damages." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 87 (O'Connor, Scalia, JJ., concurring). Reviewing courts, moreover, vary unpredictably in their willingness to adjust those awards. Constrained by presumptions that jury verdicts are correct, these courts provide too little review based on loose standards, like the degree of the defendant's "culpability" and the "desirability" of deterrence (see, e.g., *Hammond v. City of Gadsden*, 493 So. 2d at 1379), that are as imprecise as

⁶ Punitive damages law, as applied, also raises equal protection concerns. That law arbitrarily and irrationally singles out a class of defendants for punishment without the concomitant procedural safeguards available to criminal defendants. Unlike criminal defendants, defendants in punitive damages actions are denied heightened procedural safeguards, including an elevated standard of proof, limitations on the amount of penalties, pre-trial notice of charges, and bifurcated trials. See *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting). This unequal treatment is inconsistent with the Equal Protection Clause. See, e.g., *Rinaldi v. Yeager*, 384 U.S. 305, 308-11 (1966) (state statute, applying only to incarcerated defendants and requiring them, but not other defendants, to repay the costs of transcripts used in unsuccessful appeals, violates equal protection).

the punitive damages instructions to the jury—and they provide that review too late. This absence of effective judicial review of excessive punitive damages awards only heightens the due process concerns that they raise and underscores the need for this Court's review.

The notion that reviewing courts can, consistent with due process, overturn excessive damages awards is established. This Court has overturned such awards, made pursuant to civil statutes, on numerous occasions where they were "grossly out of proportion to the possible actual damages" or "so arbitrary and oppressive that [their] enforcement would be nothing short of the taking of property without due process of law." *Missouri Pacific Railway Co. v. Tucker*, 230 U.S. 340, 351 (1913); *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915); see also *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909); *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Chicago, Milwaukee & St. Paul Railway Co. v. Polt*, 232 U.S. 165, 168 (1914).

Reviewing courts should "look longer and harder" at the punitive damages awards of civil juries rendered in the absence of such statutory guidelines. See *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring). If due process forbids excessive damages awards that fall within statutory limits chosen with the "benefit of a legislature's deliberation and guidance" (*id.*), as it surely does, so too should due process forbid excessive punitive damages awards that are solely the product of a jury's "discretionary moral judgment." *Smith v. Wade*, 461 U.S. at 52; see *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350. Indeed, awards of punitive damages made in the absence of statutory standards—many of which greatly exceed any comparable maximum statutory penalty⁷—are even

⁷ Under Alabama's insurance code, for example, the monetary penalty for a willful violation of the title, which, *inter alia*, pro-

more "arbitrary" and deserve even greater judicial scrutiny.

This case amply demonstrates that current punitive damages law provides no such "hard" look. The Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986), has indeed established "guidelines" for judicial review of excessive damages awards. But those guidelines provide neither a "hard" nor "long" look at punitive damages awards. "*Hammond* relates solely to the duty imposed upon the trial judge to make findings of fact and conclusions of law, either with or without a further post-trial evidentiary hearing." *Dunkin v. Smith*, 502 So. 2d 705, 708 (Ala. 1987). And *Hammond* merely suggests that trial courts should review punitive damages awards in light of, among other factors, the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," and the "impact upon the parties." *Hammond v. City of Gadsden*, 493 So. 2d at 1379.

In practice, these cosmetic "protections" against excessive awards add nothing new. Trial courts are not required to, and often do not, hold post-trial evidentiary hearings on damages. They routinely do not state for the record the factors that they considered in granting or denying a motion for a new trial based on the excessiveness of the verdict.⁸ And, when they do so, their review is limited, for trial courts are required by law to give substantial deference to the jury's award and to "presume that the verdict [is] correct." *Charter Hosp. v.*

scribes insurance fraud, is "a fine of not more than \$1,000.00" (Ala. Code §§ 27-1-12, 27-12-17, 27-12-23 (1986))—one tenth of one percent of the punitive award in this case.

⁸ As a result, the Alabama Supreme Court has remanded numerous cases for a statement of those reasons. See, e.g., *Dependable Ins. Co. v. Kirkpatrick*, 514 So. 2d 804 (Ala. 1987); *Hayes v. Payne*, 523 So. 2d 333 (Ala. 1987); *Sharp Electronics Corp. v. Shaw*, 524 So. 2d 586 (Ala. 1987); *Carnival Cruise Lines, Inc. v. Goodin*, 535 So. 2d 98 (Ala. 1988); *L.W. Johnson & Associates, Inc. v. Rivers Construction*, 532 So. 2d 618 (Ala. 1988).

Weinberg, 1990 Ala. LEXIS 17 (Ala. Jan. 12, 1990), quoting *Campbell v. Burns*, 512 So. 2d 1341, 1343 (Ala. 1987). Thus, the *Hammond* procedure does little, if anything, to enhance the depth of post-verdict review of excessive punitive awards—and does absolutely nothing to address the "constitutionally defective" jury process that produces excessive awards in the first instance (see *Charter Hosp. v. Weinberg*, 1990 Ala. LEXIS 17 (Ala. Jan. 12, 1990) (Houston, J., concurring specially)).⁹

In short, there is little proof that this post-award review in Alabama actually works. It certainly did not work in the instant case. See Pet. App. B16 (Maddox, Steagall, JJ., dissenting in part) (*Hammond* procedure is not "sufficient to accord to litigants all the due process protection the Constitution envisions"). And it has not worked in other post-*Hammond* cases in Alabama. See, e.g., *Super Valu Stores, Inc. v. Peterson*, 506 So. 2d 317 (Ala. 1987) (\$5 million punitive damages award affirmed); *United American Ins. Co. v. Brumley*, 542 So. 2d 1231 (Ala. 1989) (\$1 million punitive damages award affirmed). Such procedures, therefore, do nothing to minimize the need for this Court's review.¹⁰

⁹ In any event, as this Court has noted (albeit in a different context), it is "unwilling to presume that a post-trial hearing will always correct whatever mistakes have occurred in the performance of the jury's factfinding function." *Beck v. Alabama*, 447 U.S. 625, 645-46 (1980).

¹⁰ Nor does Alabama's recent legislation concerning punitive damages undermine the importance of review. On June 11, 1987, after the cause of action arose in this case, the Alabama legislature enacted a statute that places a \$250,000 "cap" on punitive damages awards in certain types of cases, imposed a higher standard of proof for punitive damages awards, and disposed of the presumption of correctness afforded to punitive damages awards. Ala. Code §§ 6-11-20, 11-21, 11-23 (1989). Whether the Alabama courts will uphold this legislation is questionable. The Alabama Supreme Court has stated that "[t]o limit the jury's discretion other than by proper instruction as to the circumstances under which punitive damages are awarded would appear to violate the right of trial by jury guaranteed by Article I, § 11, of the Alabama Constitution of

3. *Imposing Due Process Limitations On Punitive Damages Law Will Not Impair The States' Interests In Compensating Victims And Punishing Wrongdoers*

Application of due process limitations to punitive damages law would not unduly intrude upon the states' interests in protecting their individual citizens. To be sure, a state does have a strong and legitimate interest in compensating private citizens for any *actual* harm that they suffer as a result of a defendant's misconduct. And a state likewise has a legitimate interest in punishing and deterring reprehensible and egregious actions toward its citizens. But current punitive damages law is not properly tailored to serve those interests.

As this Court has stated in a related context, a state has "no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349. Nor does a state have a legitimate interest in punishing defendants who caused or meant no harm. Under current punitive damages law, however, juries deprive civil defendants of their property—often based on conduct that is unintentional—and give it to victims who have already received full compensation for their injuries. As Chief Justice Rehnquist has aptly stated:

It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm, and to award a windfall, in the form of punitive damages, to someone who already has been fully compensated. These peculiarities ought to be carefully limited—not expanded to every case where a jury may think a defendant was too careless, particularly where a vaguely de-

1901." *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So. 2d 812, 837 n.2 (Ala. 1989). Recently, a federal district court certified to the Alabama Supreme Court the issue whether the \$250,000 cap is constitutional. *Trawick v. Michaels of Oregon Co.*, No. 88-C-413 N (M.D. Ala.).

finer, elastic standard like 'reckless indifference' gives free reign to the biases and prejudices of juries.

Smith v. Wade, 461 U.S. at 87-88 (Rehnquist, J., dissenting); accord American College of Trial Lawyers, *Report on Punitive Damages Of The Committee On Special Problems In The Administration Of Justice*, at 16 (1989) (concluding that no rational purpose is achieved by punishing persons or entities, under *respondeat superior* theory, where they did not participate in or ratify the wrongful conduct).

This case amply reflects the dangers of maintaining these "peculiarities" in punitive damages law and the urgent need for this Court's review. Under the liberal standard of *respondeat superior*, the Alabama Supreme Court allowed a jury to punish Pacific Mutual for the unauthorized and unratified acts of a non-exclusive agent—essentially an independent contractor—who misrepresented the nature of his agency, misrepresented the nature of the insurance that Pacific Mutual could write, and engaged in fraudulent conduct that Pacific Mutual expressly forbade. Absent review, other states, like Alabama, will continue to strike an improper balance between their interests in punishment and deterrence and the interests of civil defendants in securing adequate protections against similarly arbitrary punishment. Only this Court can properly accommodate those interests by defining the limitations that the Due Process Clause surely must place on punitive damages law.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Of Counsel:

RICHARD E. BARNSBACK

PHILLIP E. STANO

AMERICAN COUNCIL

OF LIFE INSURANCE

1001 Pennsylvania Ave., N.W.

Washington, D.C. 20004

(202) 624-2183

JOE W. PEEL

THERESA L. SOROTA

HEALTH INSURANCE

ASSOCIATION OF AMERICA

1025 Connecticut Ave., N.W.

Washington, D.C. 20036

(202) 223-7822

March 1990

ERWIN N. GRISWOLD

(Counsel of Record)

PATRICIA A. DUNN

JILL J. BEAVER

JONES, DAY, REAVIS &

POGUE

1450 G Street, N.W.

Washington, D.C. 20005

(202) 879-3939

Counsel for the Amici

JUN 1 1990

~~JOSEPH E~~ SPANIOLO, JR.
CLERK

No. 89-1279

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

**CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,**
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

JOINT APPENDIX

BRUCE A. BECKMAN
Counsel of Record
ADAMS, DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240
Attorneys for Petitioner

BRUCE J. ENNIS
Counsel of Record
DONALD B. VERRILLI, JR.
CYNTHIA MISICKA
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, DC 20036
(202) 223-4400
Attorneys for Respondents

J. MARK HART
SPAIN, GILLON, GROOMS,
BLAN & NETTLES
2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100
Attorneys for Petitioner

(Additional counsel listed
on reverse side.)

PETITION FOR CERTIORARI FILED FEBRUARY 7, 1990
CERTIORARI GRANTED APRIL 2, 1990

Of Counsel:

VICKI W.W. LAI

ADAMS, DUQUE & HAZELTINE

523 West Sixth Street

Los Angeles, California 90014

(213) 620-1240

Attorneys for Petitioner

OLLIE L. BLAN, Jr.

BERT S. NETTLES

SPAIN, GILLON, GROOMS,

BLAN & NETTLES

2117 Second Avenue North

Birmingham, Alabama 35203

(205) 328-4100

Attorneys for Petitioner

CHARLES E. SHARP

JOHN F. WHITAKER

SADLER, SULLIVAN,

HERRING & SHARP, P.C.

1100 First National-

Southern Natural Building

Birmingham, Alabama 35203

(205) 326-4166

Attorneys for Respondents

ROBERT H. ADAMS

NAJJAR, DENABURG,

MEYERSON, ZARZUR,

MAX, WRIGHT &

SCHWARTZ, P.C.

2125 Morris Avenue

Birmingham, Alabama 35203

(205) 328-5760

Attorneys for Respondents

TABLE OF CONTENTS

	Page
RELEVANT DOCKET ENTRIES	1
COMPLAINT, FILED MAY 25, 1982	3
AMENDED COMPLAINT, FILED JUNE 22, 1982.....	11
RUFFIN'S ANSWER TO COMPLAINT, FILED OCTOBER 4, 1982	15
ANSWER OF PACIFIC MUTUAL, FILED OCTOBER 22, 1982	19
MOTION TO WITHDRAW BY RUFFIN'S ATTORNEY, FILED JUNE 5, 1984.....	23
PLAINTIFF'S AMENDED COMPLAINT, FILED SEPTEMBER 18, 1986.....	25
PACIFIC MUTUAL AMENDMENT TO ANSWER, FILED MAY 29, 1987	29
MOTION FOR DIRECTED VERDICT, FILED AUGUST 6, 1987	37
REQUESTED JURY CHARGE OF CLEOPATRA HASLIP.....	45
EXCERPT PAGES FROM REPORTER'S TRANSCRIPT, CROSS EXAMINATION OF CLEOPATRA HASLIP.....	47
EXCERPT PAGES FROM REPORTER'S TRANSCRIPT, DIRECT EXAMINATION OF LIONEL WILLIAMS	63

	Page
EXCERPT PAGES FROM REPORTER'S TRANSCRIPT, DEPOSITION TESTIMONY OF RALPH PASSMAN	69
EXCERPT PAGES FROM REPORTER'S TRANSCRIPT, DEPOSITION TESTIMONY OF LEMMIE RUFFIN	71
EXCERPT PAGES FROM REPORTER'S TRANSCRIPT, DIRECT EXAMINATION OF DEBORAH AULT	74
EXCERPT PAGES FROM REPORTER'S TRANSCRIPT, DIRECT EXAMINATION OF RONALD GIASER	78
EXCERPT PAGES FROM REPORTER'S TRANSCRIPT, DEPOSITION TESTIMONY OF PATRICK LUPIA	83
EXCERPT PAGES FROM REPORTER'S TRANSCRIPT, PACIFIC MUTUAL'S MOTION FOR DIRECTED VERDICT	93
EXCERPT PAGES FROM REPORTER'S TRANSCRIPT, JURY CHARGE BY COURT	95
PLAINTIFF'S TRIAL EXHIBITS:	
EXHIBIT 2	113
EXHIBIT 7	114
EXHIBIT 14	119
EXHIBIT 16	120
EXHIBIT 17	121
EXHIBIT 18A	122
EXHIBIT 19 a	126
EXHIBIT 19 b	130
EXHIBIT 19 c	131

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/25/82	Summons and Complaint
6/22/82	Amended Complaint
10/4/82	Answer Filed by Lemmie L. Ruffin, Jr.
10/22/82	Answer Filed by Pacific Mutual Life Insurance Company
9/18/86	Second Amended Complaint
5/29/87	Amendment to Answer, Adding Constitutional Affirmative Defenses, Filed by Pacific Mutual Life Insurance Company
7/15/87	Amendment to Answer, Adding Constitutional Affirmative Defense, Filed by Pacific Mutual Life Insurance Company
8/6/87	Motion for Directed Verdict filed by Pacific Mutual Life Insurance Company
8/6/87	Requested Jury Charges by Cleopatra Haslip
8/6/87	Requested Instructions to the Jury by Pacific Mutual Life Insurance Company
8/6/87	Trial Memorandum of Pacific Mutual Life Insurance Company

8/7/87 Notice of Appeal to the Supreme Court of
Alabama by Pacific Mutual Life Insurance
Company

12/11/87 Opinion by Jefferson County Circuit Court

1/22/88 Notice of Appeal

9/15/89 Opinion Released by Supreme Court of
Alabama

11/9/89 Order Denying Rehearing by the Supreme
Court of Alabama

12/6/89 Order Denying Petition for Stay by the
Supreme Court of Alabama

12/22/89 Order Granting Stay by Justice Kennedy of
the Supreme Court of the United States

1/8/90 Order Granting Stay by the Supreme Court
of the United States

2/7/90 Petition for Certiorari Filed

4/2/90 Certiorari Granted

[COMPLAINT]

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT
FOR JEFFERSON COUNTY, ALABAMA

FILED IN OFFICE
MAY 25 1982
Polly Conradi
Clerk of Circuit Court
Jefferson County, AL

CLEOPATRA HASLIP; CYNTHIA CRAIG;
ALMA M. CALHOUN; and EDDIE HARGROVE,
Plaintiffs,

vs.

LEMMIE L. RUFFIN, JR.; LEMMIE L. RUFFIN, JR.,
d/b/a L. L. RUFFIN INSURANCE AGENCY; PACIFIC
MUTUAL LIFE INSURANCE COMPANY; A, B, C,
and D, the persons, firms, corporations, partnerships or
other entities who committed the acts or are responsible
for the wrongful conduct described in this complaint or
the injuries and damages to the plaintiffs at the times and
placed described in this complaint whose true and cor-
rect names and legal descriptions are otherwise unknown
to the plaintiffs, but will be added by amendment when
ascertained.

Defendants.

CIVIL ACTION NO. CV82 2453
COMPLAINT

Count I

1. Plaintiffs are over the age of nineteen (19) years
and are resident citizens of Jefferson County, Alabama.

2. Defendant, Lemmie L. Ruffin, Jr. is over the age of nineteen (19) years and is a resident citizen of Jefferson County, Alabama.

3. Defendant L. L. Ruffin Insurance Agency is a proprietorship owned by defendant Lemmie L. Ruffin doing business in Jefferson County, Alabama.

4. Pacific Mutual Life Insurance Company is a corporation organized and existing under the laws of the State of California and doing business in Jefferson County, Alabama.

5. Fictitious parties, A. B. C. and D are the persons, firms, corporations, partnerships, or other entities whose names, addresses, places of residence or states of incorporation are otherwise unknown, but will be added by amendment when ascertained.

6. On or about September 1, 1981, Defendants, for a valuable consideration, agreed to provide policies of life, accidental death and dismemberment and major medical insurance to Plaintiffs, Cleopatra Haslip, Cynthia Craig and Alma M. Calhoun. On or about September 1, 1981 Defendants, for a valuable consideration, agreed to provide a policy of life insurance to Plaintiff, Eddie Hargrove.

7. The coverage to be provided Plaintiffs was group policy coverage. The insurers were Union Fidelity Life Insurance Company and Defendant, Pacific Mutual Life Insurance Company.

8. Shortly after the policy was issued by Union Fidelity Life Insurance Company, Defendants represented to Plaintiffs that Union Fidelity Life Insurance Company was terminating its coverage. Defendants further represented to Plaintiffs that policies of insurance providing the exact same coverage would be procured on their behalf immediately.

9. On or about February 2, 1982 defendant Lemmie L. Ruffin, Jr. the proprietor of defendant L. L. Ruffin Insurance Agency and an agent, servant or employee of Pacific Mutual Life Insurance Company, sent a Western Union Mailgram to plaintiff Cleopatra Haslip stating that the company then providing coverage was cancelling coverage as of the effective date of her request, that all coverage would cease as of the effective date, and that all premiums paid would be refunded.

10. Plaintiffs aver that Cleopatra Haslip did not, nor did any of the plaintiffs ever at any time request the insurance coverage to be cancelled. Plaintiffs further aver that no premiums have ever been refunded.

11. Plaintiffs aver that Defendants falsely and fraudulently represented to the plaintiffs that upon the termination of the Union Fidelity Life Insurance Company's policies, other policies containing the same benefits would be provided.

12. Plaintiffs aver that after the termination of the Union Fidelity Life Insurance Company policies, Defendants falsely and fraudulently represented to Plaintiffs that other insurance coverage was in effect on their behalf.

13. Plaintiffs aver that if any insurance coverage was in effect or provided after the termination of the Union Fidelity Life Insurance Company policy, that Defendants falsely and fraudulently terminated said policies without Plaintiffs' knowledge or permission and falsely and fraudulently represented that all premiums previously paid would be refunded.

14. The representations made by Defendants were false, and Defendants knew that they were false; or Defendants, without knowledge of the true facts, recklessly misrepresented them; or said representations were

made by mistake, but with the intention that Plaintiffs should rely upon them.

15. Plaintiffs believed the representations and relied upon them and paid a valuable consideration to Defendants. In addition to the payment of a valuable consideration for insurance coverage, plaintiff Cleopatra Haslip incurred numerous medical expenses for which Defendants failed to provide coverage.

WHEREFORE, Plaintiffs demand judgment against Defendants for the sum of one million dollars (\$1,000,000.00), interest and costs, including punitive damages.

Count II

1. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 15 in Count I above.

2. Plaintiffs aver that Defendants breached their agreement with Plaintiffs by failing to provide policies of life, accidental death and dismemberment and major medical insurance coverage to Plaintiffs upon the termination of the Union Fidelity Life Insurance Company policies.

3. Plaintiffs aver that if any coverage on Plaintiffs' behalf was provided by Defendants after the termination of the Union Fidelity Life Insurance coverage, that Defendants breached their agreement with Plaintiffs by terminating said coverage without permission, authority or knowledge of Plaintiffs and by refusing to refund all premiums previously paid.

4. Plaintiffs aver that Defendants breached their agreement with Plaintiffs by failing to provide insurance coverage to insure against medical and hospitalization

expenses actually incurred by Plaintiff, Cleopatra Haslip.

WHEREFORE, Plaintiffs demand judgment against Defendants in the sum of two hundred fifty thousand dollars (\$250,000.00), interest and costs.

Count III

1. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 15 in Count I above.

2. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 4 in Count II above.

3. Plaintiffs aver that Defendants in an effort to have Plaintiffs pay sums of money to Defendants falsely and fraudulently misrepresented certain material facts, known to be false at the time said representations were made, which were relied on by Plaintiffs to their detriment. Defendants' conduct was so extreme in degree and so outrageous as to be conduct committed in bad faith.

WHEREFORE, Plaintiffs demand judgment against Defendants in the sum of one million dollars (\$1,000,000.00), interest and costs, including punitive damages.

Count IV

1. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 15 in Count I above.

2. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 4 in Count II above.

3. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 3 in Count III above.

4. Plaintiffs aver that the fictitious parties named herein, are the individuals, proprietorships, partnerships, corporations or other entities whose names and addresses are otherwise unknown to Plaintiffs but will be added by amendment when ascertained.

5. Plaintiffs aver that the fictitious parties named herein, made the same false and fraudulent representations to Plaintiffs as did the named Defendants regarding the policies of insurance, that Plaintiffs believed the representations and relied upon them and were injured as a result.

WHEREFORE, Plaintiffs demand judgment against the fictitious parties for the sum of one million dollars (\$1,000,000.00), interest and costs, including punitive damages.

Count V

1. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 15 in Count I above.

2. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 4 in Count II above.

3. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 3 of Count III above.

5.[sic] Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 5 in Count IV above.

6. Plaintiffs aver that the fictitious party defendants breached their agreement with Plaintiffs in that the fictitious party defendants failed to provide insurance coverage upon the termination of the Union Fidelity Life Insurance policy. That is any insurance coverage was in effect after the termination of the Union Fidelity Life Insurance Company policies, the fictitious party defendants terminated said policies of insurance without the permission or knowledge of Plaintiffs and that the fictitious party defendants failed to refund all premiums previously paid.

WHEREFORE, Plaintiffs demand judgment against the fictitious party defendants for two hundred fifty thousand dollars (\$250,000.00), plus interest and costs.

Count VI

1. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 15 in Count I above.

2. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 4 in Count II above.

3. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 3 in Count III above.

4. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 5 in Count IV above.

5. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 6 in Count V above.

6. Plaintiffs aver that the fictitious party defendants, in an effort to have Plaintiffs pay sums of money to fictitious party defendants, falsely and fraudulently misrepresented certain material facts, known to be false at the time said representations were made, which were relied on by Plaintiffs to their detriment. Fictitious party defendants' conduct was so extreme in degree and so outrageous as to be conduct committed in bad faith.

WHEREFORE, Plaintiffs demand judgment against fictitious party defendants in the sum of one million dollars (\$1,000,000.00), interest and costs, including punitive damages.

/s/ Robert H. Adams
ROBERT H. ADAMS
Attorney for Plaintiffs

OF COUNSEL:
CORRETTI & NEWSOM
1804 7th Avenue North
Birmingham, Alabama 35203
(205) 251-1164

Plaintiffs demand a trial by struck jury.

/s/ Robert H. Adams
ROBERT H. ADAMS
Attorney for Plaintiffs

[Certificate of service omitted in printing.]

[AMENDED COMPLAINT]

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

FILED IN OFFICE
JUN 22 1982
Polly Conradi
Clerk of Circuit Court
Jefferson County, AL

CLEOPATRA HASLIP; CYNTHIA CRAIG;
ALMA M. CALHOUN; and EDDIE HARGROVE,
Plaintiffs,

vs.

LEMMIE L. RUFFIN, JR.; LEMMIE L. RUFFIN, JR.,
d/b/a/ L. L. RUFFIN INSURANCE AGENCY; PACIFIC
MUTUAL LIFE INSURANCE COMPANY; A, B, C,
and D, the persons, firms, corporations, partnerships or
other entities who committed the acts or are responsible
for the wrongful conduct described in this complaint or
the injuries and damages to the plaintiffs at the times and
places described in this complaint whose true and correct
names and legal descriptions are otherwise unknown to
the plaintiffs, but will be added by amendment when
ascertained,

Defendants.

CIVIL ACTION NO. CV82 2453

AMENDED COMPLAINT

Come now Plaintiffs in the above-styled cause and
amends their complaint heretofore filed by adding the
following counts:

COUNT VII

1. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 15 in Count I of the original Complaint.

2. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 4 in Count II of the original Complaint.

3. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 3 in Count III of the original Complaint.

4. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 5 in Count IV of the original Complaint.

5. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 6 in Count V of the original Complaint.

6. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 6 in Count VI of the original Complaint.

7. Plaintiffs aver that Defendants, in an effort to have Plaintiffs pay sums of money to Defendant, falsely and fraudulently misrepresented certain material facts, known to be false at the time said representations were made, which were relied on by Plaintiffs to their detriment. Defendants' conduct was so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, utterly intolerable and outrageous.

WHEREFORE, Plaintiffs demand judgment against Defendants in the sum of one million dollars

(\$1,000,000.00), interest and costs, including punitive damages.

COUNT VIII

1. Plaintiffs adopt and incorporate by reference each and every allegations and averment in numbered paragraphs 1 through 15 in Count I of the original Complaint.

2. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 4 in Count II of the original Complaint.

3. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 3 in Count III of the original Complaint.

4. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 5 in Count IV of the original Complaint.

5. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 6 in Count V of the original Complaint.

6. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 6 in Count VI of the original Complaint.

7. Plaintiffs adopt and incorporate by reference each and every allegation and averment in numbered paragraphs 1 through 7 in Count VII of the Amended Complaint.

8. Plaintiffs aver that the fictitious party defendants, in an effort to have Plaintiffs pay sums of money to

fictitious party defendants, falsely and fraudulently [sic] misrepresented certain material facts, known to be false at the time said representations were made, which were relied on by Plaintiffs to their detriment. Fictitious party defendants' conduct was so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, utterly intolerable, and outrageous.

WHEREFORE, Plaintiffs demand judgment against fictitious party defendants in the sum of one million dollars (\$1,000,000.00), interest and costs, including punitive damages.

/s/ Robert H. Adams
ROBERT H. ADAMS
Attorney for Plaintiffs

OF COUNSEL:
CORRETTI & NEWSOM
1804 7th Avenue North
Birmingham, Alabama 35203
(205) 251-1164

* * * *

[Certificate of service omitted in printing.]

[RUFFIN'S ANSWER TO COMPLAINT]

CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA
FOR JEFFERSON COUNTY, ALABAMA

FILED IN OFFICE
OCT 4 1982
Polly Conradi
Clerk of Circuit Court
Jefferson County, AL

CLEOPATRA HASLIP; CYNTHIA CRAIG;
ALMA M. CALHOUN; and EDDIE HARGROVE,
Plaintiffs
vs.

LEMMIE L. RUFFIN, JR.; LEMMIE L. RUFFIN, JR.,
d/b/a L. L. RUFFIN INSURANCE AGENCY; PACIFIC
MUTUAL INSURANCE COMPANY, et al,
Defendants.

CIVIL ACTION NO: CV 82-2453

ANSWER

Comes now the Defendant, Lemmie L. Ruffin, Jr., and answers the Complaint previously filed in this cause as follows:

COUNT ONE

1. Defendant denies each and every allegation and demands strict proof thereof.
2. The Complaint fails to state a claim against Defendant upon which relief can be granted.

COUNT TWO

1. Defendant denies each and every allegation and demands strict proof thereof.

2. The Complaint fails to state a claim against Defendant upon which relief can be granted.

COUNT THREE

1. Defendant denies each and every allegation and demands strict proof thereof.

2. The Complaint fails to state a claim against Defendant upon which relief can be granted.

COUNT FOUR

1. Defendant denies each and every allegation and demands strict proof thereof.

2. The Complaint fails to state a claim against Defendant upon which relief can be granted.

COUNT FIVE

1. Defendant denies each and every allegation and demands strict proof thereof.

2. The Complaint fails to state a claim against Defendant upon which relief can be granted.

COUNT SIX

1. Defendant denies each and every allegation and demands strict proof thereof.

2. The Complaint fails to state a claim against Defendant upon which relief can be granted.

By: HANES & HANES
/s/ Thomas B. Hanes
Thomas B. Hanes
Attorney for Defendant,
Lemmie L. Ruffin, Jr.
933 Frank Nelson Building
Birmingham, Alabama 35203-3676
Phone: (205) 324-9536

[Certificate of service omitted in printing.]

[ANSWER OF PACIFIC MUTUAL]

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

FILED IN OFFICE
OCT 22 1982
Polly Conradi
Clerk of Circuit Court
Jefferson County, AL

CLEOPATRA HASLIP; CYNTHIA CRAIG;
ALMA M. CALHOUN, and EDDIE HARGROVE,
Plaintiffs,

vs.

LEMMIE L. RUFFIN, JR.; LEMMIE L. RUFFIN, JR.,
d/b/a/ L. L. RUFFIN INSURANCE AGENCY; PACIFIC
MUTUAL LIFE INSURANCE COMPANY, et al.,
Defendants.

CIVIL ACTION NO. CV 82-2453

ANSWER

Comes the defendant, PACIFIC MUTUAL LIFE
INSURANCE COMPANY, a corporation, and for an-
swer to the complaint as last amended says:

FIRST DEFENSE

Defendant denies the material averments of each and
every count of the complaint as last amended.

SECOND DEFENSE

This defendant denies that it is indebted to the plaintiffs under any policy of insurance.

THIRD DEFENSE

This defendant denies that it issued any policy of insurance which provided any coverage for Major Medical expenses to the plaintiffs.

FOURTH DEFENSE

This defendant denies that it made any misrepresentations to the plaintiffs or committed any fraud with respect to the plaintiffs with respect to any insurance as alleged in the complaint.

FIFTH DEFENSE

Defendant denies that has [*sic*] acted in bad faith with respect to the plaintiffs and alleges that the plaintiffs were never insureds of this defendant under any policies of health or Major Medical insurance and avers that this defendant has never denied any claim for medical expenses made under any policy of insurance issued by this defendant.

SIXTH DEFENSE

This defendant denies that it ever represented to the plaintiffs at any time that it would issue policies of Major Medical insurance covering the plaintiffs.

SEVENTH DEFENSE

This defendant denies that it has ever engaged in any conduct toward the plaintiffs which was atrocious, utterly intolerable, outrageous, or beyond all possible bounds of decency.

/s/ Ollie Blan
Ollie L. Blan, Jr.
Attorney for Defendant

OF COUNSEL:

SPAIN, GILLON, RILEY,
TATE & ETHEREDGE
1700 John A. Hand Building
Birmingham, Alabama 35203
Telephone: (205) 328-4100

[Certificate of service omitted in printing.]

[MOTION TO WITHDRAW BY
RUFFIN'S ATTORNEY]

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
OF ALABAMA FOR
JEFFERSON COUNTY, ALABAMA

FILED IN OFFICE
June 5 1984
Polly Conradi
Clerk

GRANTED
/s/ John E. Bryan, Jr.
Judge Date
6/21/84

CLEOPATRA HASLIP, et al.,
Plaintiff,
vs.
LEMMIE L. RUFFIN, JR., et al.,
Defendant.

CASE NO.: CV 82-2453

MOTION TO WITHDRAW

Comes now, Thomas B. Hanes, Attorney of Record for the Defendant, Lemmie Ruffin, Jr., and requests leave of Court to withdraw as counsel for the Defendant and as grounds therefor states that certain differences have arisen between attorney and client such that the attorney cannot be expected to continue his representation in this cause. The undersigned counsel further represents to the Court that this case has not been

announced ready for trial and that no prejudice will result to the other parties if he is allowed to withdraw as counsel.

HANES and HANES

By: /s/ Thomas B. Hanes
Thomas B. Hanes
933 Frank Nelson Building
Birmingham, Alabama 35203-3676
Phone: (205) 324-9536

NOTICE OF HEARING

The above and foregoing Motion will be heard before the presiding Judge on Thursday, June 21, 1984, at 10:00 a.m., Room 306 of the Jefferson County Courthouse, Birmingham, Alabama.

By: /s/ Thomas B. Hanes
Thomas B. Hanes

[Certificate of service omitted in printing.]

[PLAINTIFFS' AMENDED COMPLAINT]

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

FILED IN OFFICE
SEP 18 1986
Polly Conradi
Clerk of Circuit Court
Jefferson County, AL

CLEOPATRA HASLIP, et al.,
Plaintiffs,
vs.

PACIFIC MUTUAL LIFE INSURANCE
COMPANY, et al.,
Defendants.

CV-82-2453

AMENDED COMPLAINT

Come now the plaintiffs in this cause of action, and amend their complaint and first amended complaint as follows:

1. The plaintiffs readopt, reaver and incorporate in their entirety the complaint and first amended complaint as if fully set out herein and attached hereto and incorporate herein the complaint and first amended complaint.

COUNT IX

2. The plaintiffs readopt, reaver and incorporate each and every averment in Counts I through VIII of their complaint and first amended complaint as if fully set out

herein. At the aforesaid time and place, and as a result of the intentional, oppressive, gross and malicious fraud and deceit perpetrated by the defendants, separately and severally against the plaintiff, in violation of the Code of Alabama, §§ 6-5-101, 6-5-102, 6-5-103 and 6-5-104, the plaintiffs were caused to sustain and suffer monetary damages and great mental and emotional distress, worry, anger, frustration, embarrassment and humiliation.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs separately and severally demand judgment against the defendants, separately and severally, and compensatory damages and punitive damages in the sum of FIVE MILLION FIVE HUNDRED THOUSAND and no/100ths DOLLARS (\$5,500,000.00), plus interest from the date of judgment and the costs of this action.

COUNT X

3. The plaintiffs readopt, reaver and incorporate each and every averment in Counts I through IX of their complaint and amended complaints as if fully set out herein. At the aforesaid time and place, and at times prior and subsequent thereto, the defendants engaged in a conspiracy to defraud and/or a common scheme to defraud the plaintiffs and other innocent victims similarly situated and as a result thereof, the plaintiffs and others similarly situated, were caused to sustain and suffer monetary damages and great emotional and mental distress, worry, anger, frustration, embarrassment and humiliation.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs, separately and severally, demand judgment against the defendants, separately and severally, and compensatory damages and punitive damages in the sum of FIVE MILLION FIVE HUNDRED THOUSAND and

no/100ths DOLLARS (\$5,500,000.00), plus interest from the date of judgment and the costs of this action.

Respectfully submitted,

/s/ Charles E. Sharp
Mr. Charles E. Sharp
Attorney for Plaintiffs
1100 First National-So. Natural Bldg.
Birmingham, Alabama 35203
(205) 326-4166

/s/ Joel A. Williams
Mr. Joel A. Williams
Attorney for Plaintiffs

OF COUNSEL:

SADLER, SULLIVAN, SHARP & STUTTS, P.C.
1100 First National-So. Natural Bldg.
Birmingham, Alabama 35203

Mr. Robert H. Adams
NAJJAR, DENABURG, SCHOEL,
MEYERSON, OGLE & ZARZAUR
2125 Morris Avenue
Birmingham, Alabama 35203

Plaintiffs demand a struck jury for the trial of this action.

/s/ Joel A. Williams
OF COUNSEL

[Certificate of service omitted in printing.]

[PACIFIC MUTUAL AMENDMENT TO ANSWER]

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

FILED IN OFFICE
MAY 29 1987
Polly Conradi
Clerk of Circuit Court
Jefferson County, AL

CLEOPATRA HASLIP, et al
Plaintiffs

v.

PACIFIC MUTUAL LIFE
INSURANCE COMPANY, et al
Defendants

CIVIL ACTION NO. CV 82-2453
AMENDMENT TO ANSWER

Comes defendant, Pacific Mutual Life Insurance Company, a corporation, and amends its Answer heretofore filed by adding the following:

EIGHTH DEFENSE

Defendant avers that the actions of Lemmie L. Ruffin, Jr. as described in the Complaint were beyond and outside the line and scope of any authority which Lemmie L. Ruffin had with this defendant.

NINTH DEFENSE

This defendant denies that Lemmie L. Ruffin, Jr. was authorized by this defendant to solicit applications for,

take applications for, collect any premiums for, or make any representations with respect to any policies of medical or health insurance with Union Fidelity Life Insurance Company or with any other company.

TENTH DEFENSE

Defendant denies that Lemmie L. Ruffin, Jr. was acting within the line and scope of his authority with this defendant in making any of the alleged misrepresentations to the plaintiffs, or in collecting any premiums from the plaintiffs and failing to remit said premiums to any insurance company.

ELEVENTH DEFENSE

Defendant denies that it has any connection with, liability for, or responsibility for any agents, servants or employees of Union Fidelity Insurance Company and for any policies of insurance issued by said company, or any promises made on behalf of said company regarding policies of insurance.

TWELFTH DEFENSE

This defendant denies that it has been negligent in any way in the selection, screening, financing, supervising, or training of Lemmie Ruffin.

THIRTEENTH DEFENSE

Defendant denies that there is any cause of action under the law of Alabama for negligence or other liability to a third party for the failure of an insurance

company to select, screen, finance, supervise, or train a soliciting insurance agent.

FOURTEENTH DEFENSE

Defendant denies that it has been guilty of any conduct which entitles plaintiff to recover punitive damages.

FIFTEENTH DEFENSE

Defendant avers that the Complaint fails to state a claim upon which punitive damages may be awarded to plaintiff.

SIXTEENTH DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of the constitutional safeguards provided to defendant under the Constitution of the State of Alabama.

SEVENTEENTH DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of the constitutional safeguards provided to defendant under the Constitution of the United States of America.

EIGHTEENTH DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of the constitutional safeguards provided to defendant under the Due

Process Clause of the Fourteenth Amendment to the Constitution of the United States in that punitive damages are vague and are not rationally related to legitimate government interests.

NINETEENTH DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of Article I, Section 6 of the Constitution of the State of Alabama which provides that no person shall be deprived of life, liberty, or property except by due process of law, in that punitive damages are vague and are not rationally related to legitimate government interests.

TWENTIETH DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of the procedural safeguards provided to defendant under the Sixth Amendment to the Constitution of the United States in that punitive damages are penal in nature and consequently, defendant is entitled to the same procedural safeguards accorded to criminal defendants.

TWENTY-FIRST DEFENSE

It is violative of the self-incrimination clause of the Fifth Amendment to the Constitution of the United States of America to impose against this defendant punitive damages, which are penal in nature, yet compel defendant to disclose potentially incriminating documents and evidence.

TWENTY-SECOND DEFENSE

It is violative of the self-incrimination clause of Article I, Section 6 of the Constitution of the State of Alabama to impose against this defendant punitive damages, which are penal in nature, yet compel defendant to disclose potentially incriminating documents and evidence.

TWENTY-THIRD DEFENSE

It is violative of the rights guaranteed by the Constitution of the United States of America and the Constitution of the State of Alabama to impose punitive damages against this defendant which are penal in nature by requiring a burden of proof on plaintiff which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases.

TWENTY-FOURTH DEFENSE

It is discriminatory, a deprivation of due process and a violation of the equal protection rights guaranteed by the Fourteenth Amendment to the Constitution of the United States of America and Article I, Sections 1, 6, and 22 of the Constitution of the State of Alabama to impose punitive damages for the violation of the covenant of good faith and fair dealing *only* in contracts between insurers and insureds and not in *all* contracts in Alabama, since the same covenants of good faith and fair dealing exist not only in insurance contracts but also in *all* contracts in the State of Alabama.

TWENTY-FIFTH DEFENSE

Defendant avers that any award of punitive damages to the plaintiff in this case will be violative of Article I, Section 10 of the Constitution of the United States in that it will be a retrospective imposition of punitive damages under a new cause of action first recognized by the Supreme Court of the State of Alabama in 1981 which was subsequent to the issue of the policy of insurance sued upon in this case.

TWENTY-SIXTH DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of the Eighth Amendment to the Constitution of the United States in that said damages would be an excessive fine in violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

TWENTY-SEVENTH DEFENSE

Defendant avers that any award of punitive damages to the plaintiff in this case will be violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States in that it would provide damages to the plaintiff in excess of the amount determined to be appropriate under the formula adopted by the Alabama Legislature in 1981 in Section 27-1-17, *Code of Alabama* 1975, as amended.

/s/ Ollie L. Blan Jr.
Ollie L. Blan, Jr.
Attorney for Defendant
Pacific Mutual Life Ins. Co.

OF COUNSEL:

SPAIN, GILLON, TATE, GROOMS & BLAN
The Zinszer Building
2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

[Certificate of service submitted in printing.]

[MOTION FOR DIRECTED VERDICT]

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

FILED IN OPEN COURT

This 6 day of August, 19 87

Polly Conradi

Clerk, Circuit Court

By /s/ Jay Holloway

Deputy Clerk

OVERRULED

/s/ Charles R. Crowder

Judge Date

CLEOPATRA HASLIP, et al

Plaintiffs

v.

PACIFIC MUTUAL LIFE

INSURANCE COMPANY, et al

Defendants

CIVIL ACTION NO. CV 82-2453
MOTION FOR DIRECTED VERDICT

Comes now defendant Pacific Mutual Life Insurance Company at the close of all the evidence offered in this cause and moves the Court for a directed verdict separately and severally as to the claims of each plaintiff against this defendant.

Pacific Mutual states that it is entitled to a directed verdict for the following grounds:

1. No evidence has been offered or received which raises a jury issue as to any claim in the Complaint against this defendant.

2. The testimony and all the inferences which the jury could justifiably draw therefrom will be sufficient to support a verdict for the plaintiffs under any claim of the Complaint against this defendant.

3. The evidence does not establish facts sufficient to sustain a verdict in favor of the plaintiffs under any claim of the Complaint against this defendant.

4. The plaintiffs have failed to prove any cause of action attempted to be alleged in their Complaint or any other cause against this defendant.

5. The weight of the evidence establishes that the plaintiffs have failed to sustain their burden to prove the causes of action alleged in the Complaint against this defendant.

6. All the facts and inferences point strongly and overwhelmingly in favor of this defendant so that reasonable persons could not arrive at a contrary verdict other than one in favor of this defendant.

7. The plaintiffs have failed to prove the material allegations of their Complaint against this defendant.

8. Any verdict for the plaintiffs against this defendant will be based on sheer guess, speculation and conjecture, and not any material or relevant testimony or reasonable inference therefrom.

9. There is no evidence of any fraud or misrepresentation on the part of this defendant to persuade plaintiffs to take out any policy of insurance with defendant Pacific Mutual Life Insurance Company.

10. That there is no evidence Mr. Ruffin was acting as the agent for Pacific Mutual, or was acting within the line and scope of such agency, with respect to health insurance.

11. That the evidence conclusively shows that Mr. Ruffin, with respect to health insurance, was either acting as the agent of plaintiffs or was acting as the agent for some other insurer unrelated to Pacific Mutual.

12. That the evidence conclusively shows the actions of Mr. Ruffin with respect to collection of premiums were in violation of his agency with Pacific Mutual.

13. That the evidence conclusively shows Mr. Ruffin, with respect to collection of premiums, abandoned his agency with Pacific Mutual and was acting contrary to the interest of Pacific Mutual and was acting in furtherance of his own personal interests.

14. That the evidence conclusively shows that the actions, omissions or knowledge of Mr. Ruffin and/or Mr. Lupia with respect to health insurance are not imputable to Pacific Mutual because the same was not done or acquired while transacting the business of Pacific Mutual as its agent, but in transacting business on behalf of plaintiffs or some other insurer.

FRAUD

15. That there is no evidence that Pacific Mutual, by and through its agents while acting within the line and scope of their authority, made any misrepresentation to any of the plaintiffs.

16. That there is no evidence of the misrepresentation of a material fact to the plaintiffs.

17. That the evidence conclusively shows that no misrepresentations were made to plaintiffs Haslip, Calhoun, Craig and Hargrove because policies were in fact issued insuring said plaintiffs.

18. That the evidence conclusively shows that any representations by Mr. Ruffin were promises to perform

in the future and there is no evidence of his intent not to perform the promises when made.

19. That the evidence conclusively shows that the plaintiffs have not justifiably relied upon any misrepresentation.

20. That the plaintiffs have not suffered actual damage.

21. That Mr. Ruffin was not the agent of Pacific Mutual with respect to any acts or omissions concerning health insurance.

22. That there is no evidence that Mr. Ruffin suppressed or concealed material facts from plaintiffs.

23. That there is no evidence of a confidential relation or other particular circumstances giving rise to a duty to disclose.

24. That any misrepresentations concerning premium payments were not made to plaintiffs themselves.

25. That there is no evidence that any misrepresentations were made with fraudulent intent.

26. That the evidence conclusively shows any misrepresentations were made innocently and by mistake.

FAILURE TO PROCURE INSURE

27. That such an action does not lie against an insurer but only against an insurance agent.

28. That the evidence conclusively shows that health and life insurance was procured for plaintiffs.

29. That Mr. Ruffin was not acting as the agent of Pacific Mutual with respect to procuring health insurance.

TORT OF BAD FAITH

30. That there is no evidence of a contract of health insurance between Pacific Mutual and any of the plaintiffs.

31. That there is no evidence that claims were submitted by any of the plaintiffs to Pacific Mutual.

32. That there is no evidence of the denial of a claim of any of the plaintiffs by Pacific Mutual.

TORT OF OUTRAGE

33. That there is no evidence that the conduct of Pacific Mutual towards plaintiffs was extreme and outrageous in character so as to be utterly intolerable in a civilized society.

34. That there is no evidence that Mr. Ruffin was acting within the line and scope of his authority as an agent of Pacific Mutual engaging in any extreme and outrageous conduct.

CONSPIRACY

35. That there is no evidence Pacific Mutual participated in any conspiracy to defraud plaintiffs.

36. That the evidence conclusively shows Mr. Ruffin abandoned his agency and was acting in violation of the instructions of his principal in furtherance of his personal interests.

NEGLIGENT TRAINING, SUPERVISION, ETC.

37. That there is no such action cognizable under the laws of the State of Alabama.

38. That plaintiffs have no standing to assert this cause of action.

39. That there is no evidence in support of this claim.

40. That the evidence conclusively shows Pacific Mutual was not negligent.

41. That the evidence conclusively shows plaintiffs themselves were contributorily negligent.

42. That the evidence conclusively shows that Pacific Mutual exercised reasonable care with respect to the training, supervision, etc., of Mr. Ruffin.

43. That the training, supervision, etc., was not the proximate cause of any loss to plaintiffs.

PUNITIVE DAMAGE

44. That punitive damages may not be "vicariously" awarded against the principal for the act of its agent.

45. That punitive damage may not be awarded against the principal for the act of its agent unless the principal authorized, participated in, or ratified the act of its agent.

46. That there is no evidence Pacific Mutual had knowledge of, participated in, or ratified the actions of Mr. Ruffin complained of.

47. That the evidence conclusively shows Pacific Mutual was unaware of and did not condone the actions of Mr. Ruffin complained of.

48. An award of punitive damages to any of the plaintiffs in this case will be violative of the constitutional safeguards provided to this defendant under the Constitutions of the United States and the State of Alabama.

49. An award of punitive damages to any of the plaintiffs in this case will be violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States and Article I, § 6 of the Constitution of the State of Alabama.

50. An award of punitive damages to any of the plaintiffs in this case will be violative of the Sixth Amendment to the Constitution of the United States and that punitive damages are penal in nature and, consequently, this defendant is entitled to the same procedural safeguards accorded to criminal defendants, which have not been afforded to defendant in this action.

51. An award of punitive damages to any of the plaintiffs in this case will be violative of the Fifth Amendment to the Constitution of the United States and Article I, § 6 of the Constitution of the State of Alabama.

52. An award of punitive damages to any of the plaintiffs in this case will be violative of the Constitution of the United States and the State of Alabama if the jury is allowed to assess punitive damages under a lesser burden of proof than "beyond a reasonable doubt" burden of proof required in criminal cases.

53. An award of punitive damages to any of the plaintiffs in this case will be violative of the Eighth Amendment to the Constitution of the United States and Article I, § 15 of the Constitution of the State of Alabama in that said damages would be an excessive fine.

54. An award of punitive damages to any of the plaintiffs in this case will be violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States in that it would provide damages to the plaintiffs in excess of the amount determined to be appropriated under the formula adopted by the Alabama Legislature in 1981 in Ala. Code § 27-1-17 (1975), as amended.

/s/ Ollie L. Blan Jr.

Ollie L. Blan, Jr.

/s/ J Mark Hart

J. Mark Hart

Attorneys for Said Defendant

OF COUNSEL:

SPAIN, GILLON, TATE, GROOMS & BLAN

The Zinszer Building

2117 Second Avenue North

Birmingham, AL 35203

Phone: (205) 328-4100

[Certificate of service omitted in printing.]

**[REQUESTED JURY CHARGE
OF CLEOPATRA HASLIP]**

Number Seven -

APJI 11.03 Punitive

The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs by way of punishment to the defendants, and for the added purpose of protecting the public by deterring the defendants and others from doing such wrong in the future. The imposition of punitive damages is entirely discretionary with the jury. Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs.

**[EXCERPT PAGES FROM
REPORTER'S TRANSCRIPT]**

[Page 206 Cross Examination of CLEOPATRA HASLIP]

* * * *

out and took an application, that's the meeting I want to ask you about.

A Okay.

Q Okay. Are we together?

A Uh-huh

Q Okay. When he took those applications you knew at that time the health insurance was going to be with Union Fidelity, didn't you?

A No, I didn't.

Q Now, I want you to think about this answer, now. Are you sure —

A I'm sure.

Q — when you signed up for that that you didn't know that was going to be with Union Fidelity?

A I'm sure I didn't know that it was going to be with a different insurance company. He presented himself as a Pacific Mutual agent.

Q He gave you a card, didn't he?

A Yes.

Q And you got some Pacific Mutual life insurance, didn't you?

A My life insurance was a rider to the health insurance.

[Page 207 CLEOPATRA HASLIP]

Q But you did get life insurance?

A Yes, I did.

Q With Pacific Mutual, did you not?

A Yes, I did.

Q Okay. Do you remember when your deposition was taken in this case?

A Yes, I do.

Q Okay. Isn't it true that at that deposition I asked you a question and you told me that when you signed up for this health insurance with Mr. Ruffin you knew the health insurance was going to be with Union Fidelity?

A I don't think I told you I knew my health insurance was going to be with Union Fidelity at that time.

Q At that time, at this second meeting when you signed the application, didn't Mr. Ruffin also tell you that Pacific Mutual couldn't write the health insurance because it didn't issue that kind of insurance to municipalities?

A May I say what Mr. Ruffin said?

Q Well, did he tell you that fact, please, ma'am?

[Page 208 CLEOPATRA HASLIP]

A Okay. What he said —

Q At that meeting, did Mr. Ruffin tell you that Pacific Mutual couldn't issue health insurance to the city of Roosevelt?

A As a municipality?

Q Yes, ma'am.

A Yes.

Q And at that meeting after he told you that, he told you he would try to get health insurance with Union Fidelity?

A No, he told me that we will place you.

Q He would place you with Union Fidelity?

A No, he didn't say with Union Fidelity. He said —

Q How about another insurance company?

A He said we will place you and that as far as I was concerned, that was Pacific Mutual is who we were placed with.

Q Ms. Haslip, let's look at your deposition, here.

A All right.

Q Do you remember when you gave that; is that right?

[Page 209 CLEOPATRA HASLIP]

A I remember.

Q Okay. It looks like that was March 1st, 1984. Does that sound about right?

A Probably, I don't know the exact date.

Q Okay. And you were put under oath that day, weren't you?

A Sure.

Q Promised to tell the truth just like you did today?

A As far as I could tell.

Q And we had a court reporter like we do today?

A Sure did.

Q Okay. Now, at that time I asked you this question.

MR. WHITAKER: What page are you on, please?

MR. HART: I'm sorry. Page 17.

At that meeting he didn't tell you that you were in fact insured by Pacific Mutual, did he, and what was your answer?

A Not on the first meeting, no, he did not.

Q And then I asked you, all right. Did you

[Page 210 CLEOPATRA HASLIP]

meet with Mr. Ruffin again, and what was your answer?

A Yes, I did a few weeks after that. Mr. Ruffin came in and said that.

Q Then I said okay. Now, first of all, who all was there and when did y'all meet, your answer?

A I was individually, he met with me and him.

Q If you could just read your answer, please, ma'am.

A Okay. He just talked to me by myself.

Q Okay. Did he give you any written materials at that time, and what was your answer?

A He brought, he said that Pacific Mutual would not insure us with health, but he brought a schedule, but said that we will place you with another insurance.

Q Can you read the rest of it?

A He brought a schedule to show, and it was from —

Q Then I asked you this question. This may help you, please, ma'am, if I may, Ms. Haslip, I'm going to show you what has been marked as Plaintiff's Exhibit Number 2 to Mr. Ruffin's deposition and ask you if that is not the schedule that he showed you

[Page 211 CLEOPATRA HASLIP]

that you were just telling me about?

A Okay.

Q Yes, ma'am. Let me find that exhibit.

THE COURT: What is the number on this one?

MR. HART: This is Plaintiff's Exhibit 2 which is in evidence. Is this the schedule that he showed you that day, please, ma'am?

A This is the schedule he showed me with Pacific Mutual on it.

Q Okay. Would you tell the ladies and gentlemen whether it has Union Fidelity written on it?

A Yes, it does. It has Union Fidelity written, I guess, typed in smaller letters under here.

Q Is it typed up here right at the top before this information starts?

A Yes, it is.

Q Then I asked you this question. I said, okay. So this schedule reflects Union Fidelity, is it your recollection that the health policy was going to be written by Union Fidelity. And what is your answer at that time?

[Page 212 CLEOPATRA HASLIP]

A Okay. I said yes. When he told me that Pacific Mutual could not insure us. Said that we will place you under another insurance and he gave me this to tell me, you know, to show that the insurance was.

Q All right. And then I say, yes, ma'am and you gave me another answer, didn't you? What was it?

A He also told me at the time how much the insurance would be and we agreed that it would be payroll deductible.

Q Okay. Then I asked you this question. All right. So it was your understanding at that time that you would not have health insurance with Pacific Mutual and what was your answer?

A I said not directly with Pacific Mutual.

Q Okay. Sometime after that, Ms. Haslip, you got some things under the Union Fidelity policy, didn't you? Didn't you get a health card from Union Fidelity?

A No, I received, he brought me a blank card out there, with no number or no nothing on it.

(Whereupon, Defendant's Exhibit Number 5 was marked for identification.)

[Page 213 CLEOPATRA HASLIP]

Q Ms. Haslip, I'm going to show you what's been marked for identification as Defendant's Exhibit 5. Is that a certificate you got from Union Fidelity that you were telling me about?

A No, I did not receive any of this.

Q Are you sure, Ms. Haslip?

A I have not received that. I know you asked me about that in the deposition but I did not receive this.

My husband's name is not Alfred Haslip. I was not employed in '69. My earnings were not \$900.00.

Q Ms. Haslip?

A Yes, sir.

Q Now, at your deposition —

A I know.

Q — when I asked you a question about this case, isn't it true then that you told me that you got that?

A I did not tell you that I received this from Union Fidelity. Now, if I did I was in error.

Q Well, this was Exhibit 3 to Mr. Ruffin's

[Page 214 CLEOPATRA HASLIP]

deposition.

A Okay.

Q Let's go to your deposition now on Page 19.

A Okay.

Q Okay. Now, I asked you, Ms. Haslip, I'm going to show you Plaintiff's Exhibit 3 to Mr. Ruffin's deposition and ask you if that is not the certificate of insurance you got from Union Fidelity, what is your answer?

A Okay. That this — oh, okay, you say yes.

Q So, your answer was yes then?

A Yes, it was yes then but I did not receive this.

Q Okay. When we took your deposition in 1984 it was closer to all this than it is today, isn't it?

A It was closer to all this than it is today and you were pushing things at me faster than you were today.

Q Now, Ms. Haslip, Mr. Adams was there, wasn't he?

A Yes, sir.

Q He was your lawyer, wasn't he?

A Yes, sir.

[Page 215 CLEOPATRA HASLIP]

Q Okay. Now, he did a good job there, didn't he?

A Yes, sir, very good job.

Q Okay.

A Well, I don't have this here.

Q And that's not what you told me when I took your deposition though, was it?

A No, it might not have been. If I said yes in there —

Q Is that the truth?

A That is what I said, yes.

Q Okay.

A But I don't have it.

Q If you said yes at your deposition, is that the truth?

A No, my answer should have been no, because I don't have this, I don't have this.

Q Haven't you given that to Mr. Adams?

A Okay. This right here?

Q To use at Mr. Ruffin's deposition?

A Wait a minute, wait a minute. This right here, it seems that I remember something about this, but now all of this other coverage and all this, and

[Page 216 CLEOPATRA HASLIP]

this is my signature, and I told you that then.

Q Okay. You did tell me that then.

A This is wrong.

Q You did tell me that then?

A Uh-huh, this is wrong.

Q Okay.

A All this is wrong.

Q But let's make it clear. In this certificate you got an application.

A Okay.

Q And you signed that application; is that correct?

A Yeah, this is my signature.

Q Okay.

A This is my signature.

Q And, please, ma'am, you got that in the mail from Union Fidelity, didn't you?

A I did not receive this from Union Fidelity. This right here. I have seen this too. This is not, I don't remember whether I saw it when you brought it to my what, but all this right here is wrong.

Q Let me help you a little bit. Didn't you turn that over to Mr. Adams, your lawyer?

A I might have, I just can't recall it.

Q But you did get a health card with Union Fidelity; is that right?

A No, sir, I didn't have a health card to present them at the hospital.

Q You say you didn't get a Union Fidelity health card?

A Unh-unh, he brought me a card out there that did not have anything on it. He told me to fill it out.

Q Okay. Well, did you get a Union Fidelity card?

A I can't remember.

Q Okay. At your deposition did you tell me that you got a Union Fidelity health card?

A Did I?

Q Well, let's look.

A Okay. I said did you get any kind of health card to go along with the Union Fidelity policy, and what did you tell me?

A I said yes, I did.

Q Okay.

A Okay. That was the card that he brought

[Page 218 CLEOPATRA HASLIP]

me.

Q All right. So, after you signed the application that's in that certificate you got the certificate sent to you and the health card, are we together?

A Uh-huh.

Q You will have to answer out.

A Oh, I'm sorry. Yes.

Q Yes?

A I'm not sure.

Q Okay. Let's look at Defendant's Exhibit 5. It's got a table of contents in it, doesn't it?

A Yes, it has.

Q One of the headings is major medical insurance provisions, isn't it?

A Yes.

Q You have to answer out, please, ma'am.

A Oh --- Yes.

Q And --- is has got a schedule in it, doesn't it?

A Yes, it does.

Q And does that list the major medical benefits?

[Page 219 CLEOPATRA HASLIP]

A Yes, sir, it does.

Q Mr. Sharp earlier today went over some of those with you, didn't he?

A Yes, he did.

MR. HART: Judge, we offer Exhibit 5.

MR. SHARP: What is that now?

MR. HART: It's the certificate.

MR. SHARP: Well, she didn't get it.

THE COURT: It's in evidence.

MR. BLAN: I believe she's testified that she gave it to her lawyer.

THE COURT: It's in evidence.

Q (BY MR. HART:) Ms. Haslip —

THE COURT: Either way, it's in.

Q (BY MR. HART:) Let me show you what I have marked as Defendant's Exhibit 6.

(Whereupon, Defendant's Exhibit Number 6 was marked for identification.)

Q (BY MR. HART:) And is that your signature, please ma'am, on that paper?

A Yes, it is.

Q Okay. Is that an application with Pacific

[Page 220 CLEOPATRA HASLIP]

Mutual?

A Yes, it is.

Q Okay. What date is it signed?

A 8/19/81.

Q Okay. Now, is there a place up at the top that's got some boxes?

A Yes, it has.

Q About what kind of insurance is being applied for?

A Yes, it has.

Q Okay. And which box is checked?

A Life insurance.

Q Any other boxes checked, up here?

A No, there's not.

Q Okay. And what company's name is at the top of this form?

A Pacific Mutual.

Q Okay. So, this form has Pacific Mutual at the top; is that right?

A That's right.

Q And then it's got a box that says life insurance to check; is that right?

A That's right.

[Page 221 CLEOPATRA HASLIP]

Q And you signed this?

A Yes, I did.

Q On August the 19th, 1981?

A Yes, I did.

Q Now, let's look back here at Exhibit 5 where it's got this application in here with the Union Fidelity certificate. Now, what is the date that you signed this application?

A August the 19th, 1981. I admit that this is my signature.

Q Okay. I know. They are the same day, aren't they?

A Uh-huh.

Q Okay. Now, on Exhibit 5 this certificate for Union Fidelity, what address does it have for Union Fidelity, would you read that to the jury?

A Certificate of Insurance, Union Fidelity Life Insurance Company, Trevoise, Pennsylvania, 19049.

Q Trevoise, Pennsylvania.

THE COURT: Get to a good stopping place.

MR. HART: I'm about to do that. Where is Exhibit 2?

[Page 222 CLEOPATRA HASLIP]

THE COURT: That's the proposal.

MR. HART: Yeah, that's the proposal.

Q (BY MR. HART:) So, the Union Fidelity certificate shows Union Fidelity is in Trevoise, Pennsylvania; is that right?

A Yes, it does.

Q Okay. I'm going to show you Plaintiff's Exhibit 2. It has got some Pacific Mutual letterhead at the top, where is Pacific Mutual?

A Newport Beach, California.

Q California.

A 92660.

Q Okay. So, on August the 19th, 1981, when you signed these two applications, your health went up to Union Fidelity in Pennsylvania and your life application went to Pacific Mutual in California, isn't that true?

A No, I thought both of them was going to Pacific Mutual here in Birmingham.

MR HART: This is probably a good place to stop.

THE COURT: Y'll go to lunch and be back at 1:30 in the jury room.

[Page 223 CLEOPATRA HASLIP]

(Lunch recess.)

MR. HART: The first thing I want to do is I want to offer Defendant's Exhibit 6 which is a Pacific Mutual application.

THE COURT: All right.

CLEOPATRA HASLIP,

having been previously duly sworn, resumed the stand and testified further as follows:

CONTINUED CROSS EXAMINATION

BY MR. HART:

Q Ms. Haslip, this morning we heard Ms. Poindexter testify about a month or so after the health insurance had gone into effect that there had been some employee drop-offs and the insurance was cancelled, did you know about that?

A No, I didn't know that the insurance had been cancelled.

Q Didn't you know that the Union Fidelity policy was going to be cancelled because of the drop-off in employees?

A No, I didn't.

[Page 224 CLEOPATRA HASLIP]

Q Did Mr. Ruffin come out to Roosevelt City and talk with you about a month or so after the policy was issued and tell you that Union Fidelity coverage was cancelled?

A No, he didn't.

Q I thought this morning you told us that you had some conversations with him about the original insurance was not going to be, the health insurance was not going to be in effect any more and there was going to be some other insurance.

A He told me in December, it was the latter part of December when he told me this, but he did not tell me that we were — he said you are still covered.

Q Right, but he did tell you that who you were covered with before for health was no longer covering you, isn't that right?

A Mr. Ruffin said you are still covered and we are placing you, we have placed you with someone else, but you are still covered.

Q Now, when you sent in the hospital in January of '82 you didn't use the Union Fidelity health card when you were admitted, did you?

[Page 225 CLEOPATRA HASLIP]

A No, I didn't, because I didn't have one.

Q You didn't use it because you didn't think it was any good; is that right?

A I didn't have one.

Q Okay. I thought this morning you told me you did get one?

A No, I didn't tell you I got a Union Fidelity, I told you that Mr. Ruffin brought an insurance card out there and told me to fill it in. He did not even give me a number. I asked him about the insurance.

Q Ms. Haslip, let me refer you to Page 24 of your deposition and that day I asked you this question. Well, did you become aware like in November, December or January that the city was looking for other insurance, health insurance, and what was your answer?

A I said no. The city wasn't looking for other health insurance. Mr. Ruffin himself came to me again and told me that Union Fidelity was cancelling our insurance because we had some drop-offs.

Q Okay. That was before you went in the

[Page 226 CLEOPATRA HASLIP]

hospital in January of '82?

A Yes.

Q Is that right?

A Uh-huh, that was between the time I went to Lloyd Noland and before I went into the hospital in January.

Q Please, ma'am, on Page 46 of your deposition I asked you this question. All right. Had anyone picked up the Union Fidelity health card prior to your going into the hospital in January of 1982, what was your answer, please, ma'am?

A I said I had picked up my health card.

Q Okay. And then you said?

A I said no.

Q I asked you this question, did you still have it in your possession at that time?

A And I said, yes.

Q Okay. I asked you, all right. Had anyone told you

anything as to whether it was still valid or not, and what did you say?

A No, the only thing he told me is that they were changing over to another company and I assume when that — the card wouldn't be valid. That is why

[Page 227 CLEOPATRA HASLIP]

I didn't give them my card when I went into the hospital.

Q Okay. So, you had a Union Fidelity card when you went in the hospital, but you just didn't think it would be any good any more, because Mr. Ruffin had told you that Union Fidelity was cancelling; is that right?

A Yes, he told me that they were placing me with another insurance.

Q After he told you he was placing you with another insurance, I guess the fall of 1981, he didn't tell you he was placing health insurance with Pacific Mutual, did he?

A No, he did not tell me that.

Q After he told you that, you did not sign up for health insurance with Pacific Mutual, did you?

A No, because I signed up with him in the beginning.

Q Okay. And after he told you that Union Fidelity was cancelling, you didn't get a health card from Pacific Mutual, did you?

A No, I didn't.

Q Nor did you get a Pacific Mutual health

[Page 228 CLEOPATRA HASLIP]

certificate book or booklet?

A No, I didn't.

Q It's true, is it not, please, ma'am, from August 19th, 1981, the date of these applications and until you went into the hospital some five months later, January of

1982, you never got any health card from Pacific Mutual?

A No, I didn't.

Q You never got a certificate booklet of health insurance from Pacific Mutual, did you?

A No, I haven't.

Q You never got a policy or policy number for health insurance with Pacific Mutual?

A No, I did not.

Q Ms. Haslip, after August 19, 1981, the date of these applications, had Mr. Ruffin told you that you had health insurance with Pacific Mutual?

A Mr. Ruffin had told us we had health insurance through Pacific Mutual.

Q Please, ma'am, after the date of the application.

A After the date, after the first application?

[EXCERPT PAGES FROM
REPORTER'S TRANSCRIPT]

[Page 378 LIONEL WILLIAMS]

DIRECT EXAMINATION CONTINUED

BY MR. WHITAKER:

Q Mr. Williams, I think we were at the stage where we were approached by Lemmie Ruffin?

Yes, sir.

Q And do you recall approximately when that was, please sir?

A To the best of my knowledge around October or the fall, somewhere in the fall of '81.

Q And did he show you any business card or any forms, how did he introduce himself to you?

A Well, he had a business card, he had a folder, he had printouts with Pacific Mutual.

Q Was the business card similar to this business card that's been marked as Plaintiff's Exhibit Number 1?

A Yes.

Q And was the folder that he handed you a

[Page 379 LIONEL WILLIAMS]

folder similar to the folder that's marked as Plaintiff's Exhibit Number 12?

A Yes.

Q And all the other literature that he gave you, did it have — was it embossed across the top with the name?

A Pacific Mutual.

Q And who were you trying to get insurance for at the

time?

A For my employees.

Q What kind of insurance?

A Health insurance.

Q And did you subsequently buy health insurance through Lemmie Ruffin?

A We bought health insurance.

Q And how did you make your payments for the monthly premiums?

A Well, he indicated —

MR. BLAN: Judge, we —

THE WITNESS: We made them in cash.

MR. BLAN: Judge, we would object on the grounds that's immaterial and irrelevant.

THE COURT: Overruled.

[Page 380 LIONEL WILLIAMS]

MR. BLAN: To the issues of this case.

THE COURT: Overruled.

Q (BY MR. WHITAKER:) Tell me how that came about for him — why didn't you pay in check?

A He wanted — well, we wanted to pay in check for our records, but he indicated to me that he had to consolidate the money in order to send it in and to pay him in cash and that he would consolidate the money and send it into his company.

Q And did he come out on kind of a regular basis, that is, on a monthly basis?

A Yes, he did.

Q And what did he present you with when he came out, if anything?

A Yes, he presented me with a bill on Pacific Mutual stationery and gave it to my manager.

Q And then what would you do?

A Pay it.

Q And he would do that on a monthly basis?

A Yes, that's correct.

Q And how long, Mr. Williams, in your judgment did that go on?

A For approximately nine months, eight or

[Page 381 LIONEL WILLIAMS]

nine months, seven, eight or nine months.

Q And you paid cash for seven, eight or nine months?

A Yes.

Q Did you subsequently have a problem with your insurance with Pacific Mutual?

MR. BLAN: We object to the form of that.

THE COURT: Overruled.

THE WITNESS: Yes, I did. It surfaced when one of the employees covered went to the doctor. He came back livid with me, that I did not —

MR. HART: Object to what the employee may have said, that is hearsay.

THE COURT: Overruled. Go ahead.

MR. WHITAKER: Go ahead.

THE WITNESS: That I had not paid the bill, because the doctor said that the insurance was no good.

Q And had you been paying the bill?

A Absolutely.

Q What did you do?

A I called the office. I called the office here in Birmingham.

[Page 382 LIONEL WILLIAMS]

MR. BLAN: Judge, can we just have a continuing objection?

THE COURT: Yes, sir.

MR. BLAN: To this testimony of Mr. Williams?

THE WITNESS: Mr. Lupia.

Q Lupia?

A Lupia.

Q And what did you tell Mr. Lupia?

A That I had paid for insurance, and no claim was allowed.

Q Did you get any satisfaction out of Mr. Lupia?

MR. BLAN: Object to the form.

THE COURT: Overruled.

THE WITNESS: I did not.

Q Did you get directed to some other person to call?

A No, not by him. I found on my own where the company was in California. I called the company in California.

Q Did you register the same complaint with the people in California?

[Page 383 LIONEL WILLIAMS]

A I did.

Q Did you get any satisfaction out of them?

A I did not.

MR. BLAN: Object to the form.

THE COURT: Overruled.

Q Who did you call next?

A I called back to the home office here in Birmingham.

Q Who did you speak with then, do you recall?

A The same person, Mr. Lupia.

Q Did you get any satisfaction out of him?

MR. BLAN: Object to the form.

THE COURT: Overruled.

THE WITNESS: No.

Q Then what did you do?

A We consolidated our —

Q Did you call California any other time?

A I called them, and then I went to search for Mr. Ruffin to see if I could get an explanation as to why the money was not —

Q How many times, in your judgment, Mr. Williams, did you call Pacific Mutual's office in Newport Beach, California, about this problem?

[Page 384 LIONEL WILLIAMS]

A During that time it could have been as many as five times, because when I talked to them one day they referred me back. I called them back to let them know that I could not get satisfaction here. So, it could have been as many as three or four times.

Q Were your hospital bills or the hospital bills of your employee for which you paid premiums ever satisfied?

MR. BLAN: We object to that, if Your Honor please. He cannot go into detail of anything in the way of damages. We object to it that it's incompetent.

THE COURT: I think he can show what, if they want to go into that, they can. Then you can come back with your examination.

Q (BY MR. WHITAKER:) Were your complaints, Mr. Williams, to Patrick Lupia and to the people in California, that you had paid your premiums and now you found out that you didn't have any insurance? Is that the essential of your complaint?

MR. BLAN: Object to the form of that, that's not what the man has testified to.

[Page 385 LIONEL WILLIAMS]

THE COURT: Overruled.

THE WITNESS: Yes, sir.

MR. WHITAKER: That's all I have got. Thank you, Mr. Williams.

MR. BLAN: Judge, we move to exclude his testimony on the basis that it is not similar in time to the matter of the claim that was made in this case. No claim in this case has been made against Pacific Mutual and has not shown the basis of the denial of the claim. Has not shown anything similar to what was presented and what claimed in this case. We think it is highly irrelevant and immaterial, and it comes subsequent to the events that took place in this case. We move to exclude the testimony.

MR. HART: Judge, we would ask for limited instructions again be considered on the issue of notice prior to the Roosevelt City situation.

THE COURT: Notice to the company in California, this testimony is not for that purpose, because it does come subsequent to the events in this case. But you can receive this to determine any intent of Mr. Ruffin and his course of conduct. Go ahead.

[Page 386 LIONEL WILLIAMS]

THE COURT: Overruled.

THE WITNESS: Yes, sir.

* * * *

[EXCERPT PAGES FROM
REPORTER'S TRANSCRIPT]

[Page 392 Deposition Testimony of RALPH PASSMAN]

Q (BY MR. WHITAKER:) Identify Plaintiff's

[Page 393 RALPH PASSMAN]

Exhibit 36 first for me.

A Exhibit Number 36 is a request with a notation on it to our office that per the conversation that Pat Lupia had with my brother, Herb, to change the billing only address for this case to our Pat Lupia address, received by our office on October the 23rd, 1981.

MR. BLAN: I move to exclude it on the grounds it refers to a conversation between somebody else other than the person who's testifying.

THE COURT: All right. Overruled. Go ahead.

Q (BY MR. WHITAKER:) Well, would you please indicate for me, if you would, the notation in the upper right-hand corner of Plaintiff's Exhibit Number 36?

A The notation reads, Herb, per our conversation, please change the billing only address for this case to our address, Pat Lupia.

Q And can you identify the writing on this Plaintiff's Exhibit — we need to identify this, Charlie.

MR. SHARP: I want to offer them but I

[Page 394 RALPH PASSMAN]

don't want to show them to them until you read it out.

MR. WHITAKER: We already did. I thought that I'd have them identified.

MR. BLAN: I thought they were already in.

MR. SHARP: If they're already in there's no objection on my part. I didn't think they were already in.

MR. BLAN: I think they are already in, Judge, but if they're not I would object to them again. They pertain to documents that are hearsay to my client.

THE COURT: All right. Overruled.⁶

Q (BY MR. WHITAKER:) And would the billing only address be the address to which you would have sent the termination notices?

A That is correct.

Q That is how you handle it in the normal course of your business, is it not? That is that termination notices are sent to the billing address?

A That is correct.

Q And this address on Plaintiff's Exhibit Number 33, City of Roosevelt, care of Pat Lupia, 530

[Page 395 RALPH PASSMAN]

Beacon Parkway West, Number 400, Birmingham, Alabama, 35209, that is the billing address?

A That is the billing address, that is correct.

[EXCERPT PAGES FROM
REPORTER'S TRANSCRIPT]

[Page 452 Deposition Testimony of LEMMIE RUFFIN]

Q All the people at Roosevelt City — a check was written and sent to you, and whatever happened to the money after that was up to you and your company?

A Yes, that is correct.

Q That time, money was sent to you directly or checks made payable to you directly?

A On a couple of occasions.

Q Did you have different accounts for Union Fidelity and Pacific Mutual?

A No, I didn't.

Q Did you put all the money into one account?

A Yes, I did.

[Page 453 LEMMIE RUFFIN]

Q At any time that you sold insurance, were you ever acting in a capacity other than as a representative of Pacific Mutual Insurance Company?

A No.

[Page 454 LEMMIE RUFFIN]

Q As far as you can recall, that was the capacity that you represented yourself to the people at Roosevelt City, as an agent of Pacific Mutual Company?

A Yes.

[Page 462 LEMMIE RUFFIN]

ever got contacted by me, you were told by Mrs. Poin-dexter that they were not supposed to accept the refunds?

A That is exactly right.

Q Do you know what ultimate disposition was made of those funds?

A Always under my control

Q So you ultimately took the funds —

Q You say those funds that you attempted to reimburse, but were not allowed to, were always under your control?

A They are still in the bank.

Q What bank is that?

A Right now, they are in Metro.

Q What kind of account is it in?

A Savings account.

Q What is the name on that account?

A It is in my wife's name.

Q What you are saying, the funds that were to be reimbursed to the employees of Roosevelt City have now been placed in a savings account in your wife's name?

A That is correct.

[Page 464 LEMMIE RUFFIN]

Q How long do you say it was after Union Fidelity cancelled the insurance that my clients continued to make payments to you?

A I don't think they did that but once or twice.

Q One or two months' premiums?

A Right.

Q And that would have been as a result of the bill you

would have sent and told them to remit that amount?

A Yes.

[Page 465 LEMMIE RUFFIN]

Q That would have been at your instructions?

A Yes.

Q And during this period of time that this was going on, you were still operating out of the Pacific Mutual Office?

A Yes.

Q Your correspondence and communication with my clients would come to them by way of Pacific Mutual letterheads?

A That is correct.

[Page 477 LEMMIE RUFFIN]

Q Do you recall, in fact, how you introduced yourself when you went out to make proposals?

A Yeah, I do. I would introduce myself as Lemmie Ruffin with Pacific Mutual, and, of course, I would talk about some of the history of the company.

[EXCERPT PAGES FROM
REPORTER'S TRANSCRIPT]

[Page 497 Direct Examination of DEBORAH AULT]

Q I asked you questions, and I'll ask you again because I don't know exactly what the record says. You were the receptionist as well as some other duties and you answered the phone over there at Pacific Mutual?

A Yes, sir.

Q Did you receive some complaints from some policyholders that had been sold by Mr. Lemmie Ruffin?

A Yes, sir.

[Page 499 DEBORAH AULT]

Q (BY MR. SHARP:) And what type of information would they give you over the phone?

A They would tell me that they had purchased insurance with our company through Lemmie Ruffin and then when they had submitted a claim, they had been in the hospital or seen a doctor and they were informed that they did not have insurance with us.

Q And what would you do with that information?

THE COURT: Now, ladies and gentlemen, this evidence is not received for the truth of it. I mean the fact that some complaint was made does not mean it is true. That is not what this is offered for.

[Page 500 DEBORAH AULT]

This information, this testimony is offered if believed by you for any information on questions of notice to the

defendant Pacific Mutual Insurance Company. Not whether information received was in fact true. Go ahead.

[Page 501 DEBORAH AULT]

Q What would you do with the complaints that came in, would you write down some information about them?

A Yes, sir, I'd write down the name of the person calling and who they worked for and the agent's name and how we could get back in touch with them.

Q And the agent's name that we're talking about now is?

A Lemmie Ruffin.

Q And after taking down information, what would you do with the information?

A Take it to Mr. Lupia.

Q Who was he?

A Agency manager.

Q And beginning in November of 1980, what was the frequency of the calls.

A Two or three times a week.

Q And for how long did that continue two or

[Page 502 DEBORAH AULT]

three times a week?

A Approximately, I don't know, eight or nine months.

Q When you would give this information to Mr. Lupia, would he make a statement to you?

A Yes, he would tell me that he would talk with Lemmie about it and they would take care of the problem.

[Page 523 DEBORAH AULT]

* * * * *

Q And after you had recorded all these phone calls and everything to your boss, did he remain in the employment?

A Yes, he did.

Q He was never terminated as long as you were there?

A Yes, sir.

[Page 526 DEBORAH AULT]

* * * * *

Q Was it against the policy of the office for an agent to have a check made out to him individually?

A Yes, it was.

MR. BLAN: Object to the form of the question. I also object as it's irrelevant and immaterial in this case.

THE COURT: Overruled.

Q (BY MR. SHARP:) Do you know any instances

[Page 527 DEBORAH AULT]

where any complaints were coming in that Mr. Ruffin had accepted either cash or checks made out to him personally or his company?

A There were not any complaints called in to me, but he did bring me checks.

MR. BLAN: I object to it because it's non-responsive.

Q (BY MR. SHARP:) Well, did he bring you checks made out to him?

A Yes, he did.

Q And did you inform him that that was against the policy of the office?

A Yes, sir.

Q Did you tell Mr. Lupia that he was doing that?

A Yes, I did.

Q Did he ever change doing that or did he continue to violate that procedure?

MR. BLAN: I object to the form.

THE COURT: Did he continue to do that or did he stop?

THE WITNESS: He continued.

MR. SHARP: I have no further questions.

[Page 528 DEBORAH AULT]

RECROSS EXAMINATION

BY MR. BLAN:

Q You told Mr. Lupia that, didn't you, and didn't Mr. Lupia then come back to you and say that he had talked with Mr. Ruffin and told him not to do that any more?

A Yes, he did.

THE COURT: Anything else?

MR. SHARP: Did the same thing happen again? And he kept on again and you went through the same process?

A Yes, sir.

REDIRECT EXAMINATION

BY MR. SHARP:

Q How many times did you go through that same process?

A There were several.

* * * * *

**[EXCERPT PAGES FROM
REPORTER'S TRANSCRIPT]**

[Page 614 Direct Examination of RONALD GIASER]

Q Now, I want to show you what's been marked as Plaintiff's Exhibit Number 14 and I think you've previously seen that, have you not?

A I have seen that, yes, sir.

Q Now, I want to represent to you that that has been previously testified that this was a letter sent or a notation made by Patrick Lupia to Ralph Passman at Passman & Associates to change the billing only address from this case to our address, do you understand what I'm saying?

A Yes, I do.

Q And if I represent to you that what happened in this case as represented by this document

[Page 615 RONALD GIASER]

and Plaintiff's Exhibit Number 16 is that the late notice instead of going to the City of Roosevelt went to the general agent, Mr. Patrick Lupia, do you find fault in that as an expert in the insurance industry?

MR. BLAN: I object to the form of the question as to whether he's qualified for that.

THE COURT: Overruled.

THE WITNESS: That is not standard for the insurance industry.

Q Why?

A Because it eliminates the necessary checks and balances that all insurance policies inherently must have. The owner of the policy is the City and/or the insured. In this particular case, this individual introduced himself

into a situation whereby the insurer or the insuror were no longer in direct relationship to each other.

[Page 617 RONALD GIASER]

Q Are the, you say the persistency ratings

[Page 618 RONALD GIASER]

that are looked at by not only — well, did you look at the persistency ratings of the agents that worked with you?

A Every month, yes, sir.

Q And in the industry is it a common practice for those persistency ratings to go to the home office and/or to the regional office?

A They come from the home office.

Q And what's the standard in the industry for reviewing those persistency ratings?

A That's the most important measure of performance that an insurance company has.

Q Besides the persistency rating, let me ask you this question.

Are those persistency ratings generated by computers?

A Sure.

[Page 619 RONALD GIASER]

Q Besides a, I'm asking this question as standard in the industry, besides the persistency rating as a tool by which you check an agent's progress are there other

ways in the industry to check their progress or their status by way of computer check, do you understand my question?

A I understand your question, but the most obvious method would be to check and see if there were a lot of commission charge backs, those also are generated internally, to see if this individual, for example, if he's been advanced commission, when he writes a case, the type of financing that is used for agents, one of the methods of financing is to advance

[Page 620 RONALD GIASER]

commissions which I believe they did in this case and so they would have a knowledge of how much they paid him and how much gone off the books so therefore he would have a debit balance sitting there, they would know that.

Q Let me see if I understand that. If you sell an insurance policy and you get one month's premium in and it's a semi-annualized commission basis, then you as the agent would get your percentage of your first year's commission right away; is that right?

A Correct, that's one method.

Q But really you would get more than what the premium that the company brought in for that first month, wouldn't you?

A Why certainly.

Q Generally?

A You'd get most of the year's commission, not all of it but you get most of it immediately.

Q So then you sell me a policy and I cancel it after one or three months, then all that commission that was paid to you, there's some that you are entitled to, right?

[Page 621 RONALD GIASER]

A That's right.

Q And then the computer kicks that out and the people at the home office and the people locally know about it, right?

A Well, of course they know about it.

Q And that's another way that you keep check on the progress and how somebody, an agent, is doing in the field?

A Correct.

Q Keeping the policy in force?

A Correct.

Q Ron, I'm sorry, Mr. Giaser, are you familiar with the standard in the industry for checking up on agents who are not keeping policies in force, that is, have a poor persistency rating?

A How they would be checked up?

Q What is the —

A Certainly.

Q What is the general practice in the industry for checking up on that?

A Okay. That is a superintendent would look at persistency reports, he would get in touch with the manager and he'd ask the manager to give a

[Page 622 RONALD GIASER]

detailed explanation of what is occurring with this particular agent and why he is being retained or what actions are being done to alleviate this persistency problem, the insurance company doesn't make any money unless the policy stays in force.

[Page 648 RONALD GIASER]

* * * *

Q Do you think he was succeeding at that point?

A No, sir, this man was not — he did not succeed from the very first month. His losses were

[Page 649 RONALD GIASER]

astronomical.

Q So, you're telling this jury, Mr. Giaser, the person that made \$15,250 was not succeeding in the insurance industry?

A Sir, he was not making —

Q Is that what you're telling the jury?

A — \$15,200 in my way of thinking. He was being advanced money against policies that were lapsing, and there was a large disparity between what he was actually earning and what he was being paid.

* * * *

**[EXCERPT PAGES FROM
REPORTER'S TRANSCRIPT]**

[Page 723 Deposition Testimony of PATRICK LUPIA]

* * * *

Q Was a Pacific Mutual agent authorized to use the letterhead stationery of Pacific Mutual to submit billing estimates to an insured such as the City of Roosevelt City:

[Page 724 PATRICK LUPIA]

A We would not have prepared those. There would be no stated policy that would say you are or you are not permitted to do it. It is — I mean, it is against the law. You're not allowed to do that.

Q That is what I am asking. Does the agent have a right to prepare a premium statement or a billing statement to a city or to a group insured?

A No. Does not.

Q Did you have any knowledge that these may have been submitted to the City of Roosevelt City either by Lemmie Ruffin or by anybody else?

A No.

Q Have you ever seen those before today?

A Not until the last couple of days.

Q In 1980 and 1981, did Lemmie Ruffin have any authority or permission from you to collect premium checks from the City of Roosevelt City or any other insured payable to him?

A Payable to him?

Q Yes, sir.

A No, that is against the law.

Q Was Lemmie Ruffin ever instructed by you not to accept premium check from any insured payable

[Page 725 PATRICK LUPIA]

* * * *

to him?

A No, we never talked about it.

Q Is that contained in any of the training material or instruction material or anything that Lemmie Ruffin would have?

A I think it is also on page one of the license that he had to say that he has not done that.

Q Did you have any knowledge that Lemmie Ruffin may have accepted checks from anybody in payment of premiums, such checks being made payable to him individually?

A No.

Q All right. When Lemmie Ruffin was being recruited as an agent, did you talk with him?

A Yes.

Q On more than one occasion?

A Yes.

Q Did you discuss with him about what monies he would need in order to pay his expenses?

A In relation to the form that is in there, yes.

Q And did you have some discussion with him that he — his income from Pacific Mutual would only be based on commissions on policies that he sold?

[Page 726 PATRICK LUPIA]

A He understood that.

Q Did you discuss that with him?

A Yes, he knew he was on straight commission if that is the question.

Q Was he told that?

A Yes.

Q Now, after he came or after he was licensed as an

agent of Pacific Mutual, did you furnish to him any books or other materials in the nature of training materials?

A Yes.

Q And what are those, please, sir?

A The ones that come to mind are the R&R courses that we used, which were advanced training in the area of business insurance, group insurance, basic planning, things like that.

Q Are those materials that are furnished by the Research and Development Institute?

A Yes.

Q Is that an industry-wide organization?

A Yes.

Q And do they put out courses or books on various subjects of interest to insurance agents?

[Page 727 PATRICK LUPIA]

A And all industries.

Q And were those books and materials furnished to Lemmie Ruffin while he was an agent with Pacific Mutual?

A Yes.

Q What procedure did you go through in furnishing those to him?

A When we put together a group of class of people that we were going to have in this thing that I would end up teaching, you would notify Warren Young, give him the names of the people that were going to be involved, and then he in turn would ship to you the books, poackages, [sic] all cellophane strapped. He would then contract with R&R direct for a grading service specifically in the name of each person that was going to be in that class. And he was charged accordingly.

Then I would conduct the classes. They would fill out their — their test materials and their reecap [sic] sheets of what they did or didn't learn in the thing, mail them off directly to R&R, and they would be returned graded to them. And then in turn Warren Young would have been notified they did or

[Page 728 PATRICK LUPIA]

didn't complete the course.

Q During the time that you were agency manager there in Birmingham, do you specifically remember that Lemmie Ruffin took some of those courses?

A Oh, he was in — he was in, to the best of my knowledge, in all of them.

Q All right. Did Lemmie Ruffin come into the office there in Birmingham on a regular basis?

A As regular as anybody.

Q All right. Now, during the time that he was there, and specifically during 1981 and '82, did you see him on a frequent basis?

A Yes.

Q How often would you say that you saw him?

A Every couple of days, two or three times a week.

Q Did you talk to him?

A Whenever he came in the office, we always talked.

Q Did he have questions from time to time?

A Lemmie — Lemmie would have questions about getting things down. Lemmie very seldom was interested in spending lots of time just shooting the

[Page 729 PATRICK LUPIA]

breeze. He was pretty busy. He was always working.

Q Did he from time to time ask you questions about things that he had — that he had discovered or come across in his business as an insurance salesman?

A How to? He was more inclined to call me.

Q Did you try to answer those questions?

A Whenever he asked.

Q Did he from time to time talk to you about problems that he might have had in selling or anything of that nature?

A He thought that was my job.

Q And did you talk to him on that basis?

A Yes.

Q And did this go on the entire time that he was an agent there in Birmingham?

A That was the relationship that I had with him.

Q In 1980 was there any formal training program required by Pacific Mutual for an experienced agent?

A No.

Q And was Lemmie Ruffin, when he was licensed by Pacific Mutual, an experienced agent?

[Page 730 PATRICK LUPIA]

A Yes.

Q What does that mean?

A That he was an experienced agent? That he could not be hired as an inexperienced agent, which means that he did not qualify for financing. He had been in the business more than two years.

Q He had been —

A In the business more than two years.

Q Did you have any knowledge back in 1980 or '81 that Lemmie Ruffin may have been sending out premium statements or billing statements to the City of Roosevelt City?

A No.

Q Did you have any knowledge that Lemmie Ruffin may have been collecting premiums from the City of Roosevelt City by checks made payable to him individually?

A No.

Q Did you ever have any knowledge that Lemmie Ruffin may have been collecting premiums from either the City of Roosevelt City or some other insured and not sending them in to the insurance company?

A He — no. No.

[Page 731 PATRICK LUPIA]

Q Did you ever hear of that?

A No.

Q Did you ever have anybody call you or write you or hear anything to that effect while you were agency manager?

A To the best of my knowledge, no.

Q In 1981 or '82 did you have any relationship with John Alden Insurance Company?

A No.

Q Are you familiar with what is called a list billing?

A Yes.

Q And would you tell us what that is, please, sir.

A It is a facility that Pacific Mutual and a number of insurance companies offer, more often for business insurance than individuals, where they have a minimum number of policies so that they can send one billing statement. Normally it is also to facilitate payroll deduction and the remittance can be done on one check from that entity.

Q In 1981 was Pacific Mutual billing some insureds by list billings?

A At all — anywhere?

[Page 732 PATRICK LUPIA]

Q Yes, sir.

A Oh, yes. Yeah.

Q And did you have a procedure there in the Birmingham office for list billings?

A Yes.

Q Tell us what that was.

A It was the Pacific Mutual policy, it was not ours.

Q All right. What was that?

A The billing statements were sent from Pacific Mutual to the agency. I do not recall whether it was four or five parts. But they are sent to the agency. Two were sent to the company, one was given to the agent to let him know that the billing statement was in. The two statements that went to the company, they would mark up one as to who was still on the sheet or who wasn't, recalculate the new premium, put it on the bottom, and return that along with their check to the agency and retain the other one for themselves.

Q All right. Now, when you talk about —

A The employer or whatever.

Q The employer?

[Page 733 PATRICK LUPIA]

A Yes.

Q And if you assume — assume if you would that the City of Roosevelt City was put on a list billing arrangement for the policies of life insurance that Lemmie Ruffin was instrumental in selling to employees of Roosevelt City, would that list billing have come from the home office in Newport Beach or Pacific Mutual to your agency in Birmingham?

A If it was a Pacific Mutual list billing, yes.

Q And then as I understand it, two copies would have been sent by your agency to the City of Roosevelt?

A Right, by the person in charge of the list billing.

Q Did you have somebody in your office that was handling that?

A That was one of the functions of one of the girls, yes.

Q Mr. Lupia, I am going to show you what was marked as Plaintiff's Exhibit 12 to the deposition of Mr. Young and Ms. Brown and Mr. Flessas. This is the

[Page 734 PATRICK LUPIA]

policy file of Eddie Hargrove.

A Okay.

Q And this is for a policy of life insurance issued to him by Pacific Mutual.

A Uh-huh, yes.

Q Now, I want to draw your attention to a page in this exhibit that has got a list of, I believe, ten names on it with some figures. And up here at the top, although this is partly cut off, it is addressed to the City of Roosevelt City.

Now, do you recognize that document?

MR. BLAN: This is the document that I am referring to right here, Defendant's Exhibit 21 on the file of Eddie Hargrove.

A For list billing, yes.

Q Now, is this the thing that we have just been talking about?

A Yes.

Q As far as a list billing?

A That is it.

Q And can you tell by looking at this what copy of a list billing this is?

A No. Based on what I see, it appears to be

[Page 735 PATRICK LUPIA]

the one coming back from the City of Roosevelt, but that is only because the things are scratched out.

Q During the time that you were agency manager in Birmingham, did any complaint from any policyholder come to you about Lemmie Ruffin to the effect that he may have made misstatements concerning coverage of any policies?

A No.

Q Did any complaints come to you during that time about Lemmie Ruffin concerning any collection of premiums on any policies?

A No.

Q I believe the agency in Birmingham was closed about July of 1982; was it not?

A I am not sure of the date.

Q Was Lemmie Ruffin terminated as an agent for Pacific Mutual at or about the same time the agency was closed?

A I don't think so. I think that each agent that was still there that lived in Birmingham — because the decision had been made for me to leave. I mean I was going. That those who still lived in the community who wanted to be agents were given the

* * * *

[Page 746 PATRICK LUPIA]

* * * *

Q Did the — was all of the correspondence related to the Union Fidelity policy that you wrote generated out of the Pacific Mutual office in Birmingham?

A My personal business?

Q Policies that you wrote for Union Fidelity; is that correct?

A Yes, I believe they were.

Q And all of the correspondence that you received would have been received at the Pacific Mutual office?

[Page 747 PATRICK LUPIA]

A At the office, that's correct.

Q Would all of the policies and would all of the phone calls that you received with regard to Union Fidelity policies be received at the Pacific Mutual office?

A They would have had to have been.

Q And would all of the phone calls or most of the phone calls that you made with regard to Union Fidelity policies be made from the Pacific Mutual office?

A Probably.

Q Would it be true, Mr. Lupia, that all of the activities with regard to Union Fidelity policies that you were involved with were either generated from or came to the Pacific Mutual office?

A Yes. I would say that is true.

* * * *

**[EXCERPT PAGES FROM
REPORTER'S TRANSCRIPT]**

[Page 782 PACIFIC MUTUAL'S MOTION FOR
DIRECTED VERDICT]

* * * *

THE COURT: All right. Now we get down to — or are we through?

MR. SHARP: Fraud is the only claim in the case?

MR. WHITAKER: Probably. I've got my jury instructions, that would probably cut out just number 17 of the instructions.

THE COURT: All right.

MR. HART: Two more points in respect to the motion —

THE COURT: Well, I've already let the jury go to lunch. Go ahead.

MR. BLAN: What are you doing?

MR. HART: I'm just going to finish up with the motion. We had a couple more grounds.

THE COURT: Go ahead.

MR. HART: One, we say we ought to get a directed verdict on punitive damages and that claim against Pacific Mutual, there's been no evidence of fraudulent attempt made to Pacific Mutual. There's no evidence that authorizes these particular acts and knew of the ratify governing the form and fashion and that it would be unconstitutional to hold them

[Page 783 PACIFIC MUTUAL'S MOTION FOR
DIRECTED VERDICT]

vicariously liable for punitive damages under these circumstances.

Judge, we have also itemized in our motion for directed verdict other constitutional challenges through the submission of punitive damages and the award of punitive damages in this case.

THE COURT: All for the plaintiff.

MR. HART: Well, they're based constitutional grounds such as the standard of —

THE COURT: Oh, yeah.

MR. HART: We've outlined it in there, previous self-incrimination, there's no constitutional safeguard, they ought to have to find punitive damages beyond a reasonable doubt standard and the other grounds that we've itemized.

THE COURT: That's a reasonable argument but it's just not the law in Alabama right now.

Anything else?

MR. HART: That's it.

THE COURT: Do you want to say anything in 25 words or less?

MR. WHITAKER: No, Your Honor.

THE COURT: All right. I just want to tell

* * * *

[EXCERPT PAGES FROM
REPORTER'S TRANSCRIPT]

(Page 883 JURY CHARGE BY COURT)

* * * *

Alabama as it pertains to this case. That I am about to give you. You take the law as I'm about to give you. You apply it to those facts that you determine and from that you arrive at the verdict.

Now, there are four plaintiffs in this case, and I don't know that I can call them all by memory, Cleopatra Haslip, Cynthia Craig, Alma Calhoun, and Eddie Hargrove. They all filed a lawsuit and they're all joined in this case, to be heard by one jury. So, you have got four verdicts in this case, there will be four verdicts. These plaintiffs — they sue two separate defendants.

They sue an individual by the name of Lemmie Ruffin. Now, Mr. Ruffin is not here. You have not seen nor heard from him. And you can take that into consideration in determining your verdict, against or in favor of him. It shouldn't be controlling.

The burden of proof is on the plaintiffs, all four of them to reasonably satisfy you from the evidence that they are entities. That their contentions are correct that they're entitled to a verdict. In other words the plaintiffs must from

[Page 884 JURY CHARGE BY COURT]

the evidence reasonably satisfy each of you of the correctness of their contentions. That is that they should prevail against one or both of the defendants. And

failing in that burden of proof the defendant should — you should be in favor of the defendants.

The lawsuits are against Lemmie Ruffin and there is mention of doing business as L. L. Ruffin Insurance Agency, and that is of course Lemmie Ruffin. So, actually it's a lawsuit against him, and as I have said he is not here.

The lawsuit is also against Pacific Mutual Life Insurance Company, which is a corporation. It is the contention of the plaintiffs that Mr. Ruffin was acting as an agent of that corporation, Pacific Mutual Life Insurance Company. While acting within the line and scope of his employment for that particular defendant he perpetrated a fraud upon these particular plaintiffs.

So, the allegations of the four plaintiffs against the two defendants is one of fraud. Now, what is fraud in the state of Alabama? What do the plaintiffs have to prove in this case to reasonably satisfy you that a fraud has been perpetrated upon

[Page 885 JURY CHARGE BY COURT]

them?

Fraud in the state of Alabama is this: It is the representation of a material fact as truth, that is a representation either by words or act, that that particular fact is true. Second, that representation of that fact as true must in fact be not true, that is the defendant represents a fact to be true when in fact it is not true. The defendant must have known at the time he made that representation that that fact was not true or he should have known that it was not true. That is, he makes a representation that a certain fact is true and it's really untrue and he knows it or should have known it.

The plaintiffs did not know it was untrue, in other words they thought it was true, they relied upon the representation of the person making that representation. That is, they thought that it was true and in fact relied upon that representation as true even though it was untrue. And that representation that is relied on by the plaintiffs caused injury or damage.

Now, let me go over that again. Because

[Page 886 JURY CHARGE BY COURT]

you are hearing that for the first time, let me go over it again and I am going to try to explain it where you can understand it. Fraud in the state of Alabama is the representation by a defendant of a fact which is true. That is the defendant represents a certain fact to be true, when in fact that fact is untrue. The defendant making that representation knows that it is untrue when he makes the representation or he should have known that it was untrue. The plaintiffs think that it is true and rely upon that representation, that it's true, even though unbeknownst [*sic*] to them it's untrue. That is they rely on it, that is a reasonable person acting in their place would have relied upon the representation to be true. If they are acting reasonable then they have a right to rely on a representation. If they're acting reasonably, I'm talking about the plaintiffs, and based on that reliance they are damaged or as a direct result of that misrepresentation and their reliance upon it they are in fact damaged.

So, those are the four or five elements. You can combine them but those are the elements of fraud. Representation by the defendants of the fact

[Page 887 JURY CHARGE BY COURT]

to be true when in fact it is untrue. The defendant knows it is untrue or should have know it was untrue. The plaintiff relies upon it, acting reasonably they rely upon it, and they are damaged. So, if you are reasonably satisfied from the evidence of those elements that were committed by a person named in this case then it would be your duty to find that a fraud was perpetrated or committed upon the plaintiffs.

Now, as to Lemmie Ruffin he is an individual. In order to find him guilty of fraud you must find from the evidence that Lemmie Ruffin made a representation either by words or acts that a fact was true. Lemmie Ruffin knew it was not true or should have known it was not true. The plaintiffs each of them, each separate case, look at the cases differently. Whichever plaintiff's case you're talking about, that particular plaintiff must have not known it was untrue or thought it was true, relied upon the representation as true and was thereby damaged. And if you are reasonably satisfied from the evidence that Lemmie Ruffin is guilty of those acts that is all or those elements are true as they

[Page 888 JURY CHARGE BY COURT]

apply to him as an individual then you should find him guilty of fraud, I use the word guilty I should — that sounds like a criminal, that's not what I am talking about. You should find him liable in damages for fraud.

Now, Pacific Mutual. Pacific Mutual is not an individual, Pacific Mutual Life Insurance Company is a corporation. Now, the allegations in this complaint by the separate plaintiffs is that Lemmie Ruffin committed the fraud. I told you what you have to find in order to

find that and that Pacific Mutual Life Insurance Company is responsible for Lemmie Ruffin's fraud, because Lemmie Ruffin was the agent of Pacific Mutual.

Now these are allegations. Now, I am not telling you that these are allegations of the plaintiff. Lemmie Ruffin was the agent of Pacific Mutual Life Insurance Company. While he perpetrated this fraud upon the plaintiffs acting within the line and scope of his authority and as a direct result of that the plaintiffs were injured. Thereby Pacific Mutual Life Insurance Company should be responsible in damages.

[Page 889 JURY CHARGE BY COURT]

Now, what's the law in that regard?

Well, first of all what is an agent?

The allegations is that Lemmie Ruffin was the agent of Pacific Mutual Life Insurance Company. The law of Alabama is, and I'm going to read some of it, an agent is a person who by agreement with another, called the principal, here the allegation is Lemmie Ruffini is the agent, Pacific Mutual is the principal. An agent is a person who by agreement with another, called the principal, acts for the principal and is subject to its control.

When an agent is engaged to perform a certain service, that is the principal engages a person to perform a service for them under their control. When an agent is engaged to perform a certain service whatever he does to that end or in furtherance of his employment, is deemed to be an act done within the scope of his employment or within the line and scope of his employment. So, if he is engaged to perform a certain act under the control of the principal whatever he does in furtherance of that

employment or in furtherance of that purpose is deemed to be an act done within the line and scope of

[Page 890 JURY CHARGE BY COURT]

his employment.

You will hear the term line and scope of his employment a few more times. So, that is what we are talking about, that is any act of which the agent does, in this case the allegations Lemmie Ruffin does, in furtherance of that is the allegation, is Pacific Mutual engaged him to sell life insurance. Any act that he performs in furtherance of that deemed purpose is deemed to be an act done within the line and scope of his employment.

Now, is the principal liable for the fraud of its agent? If you find that Lemmie Ruffin was guilty of fraud, is Pacific Mutual liable for that? There is a law in regard to that.

The principal is liable for the fraud of his agent acting within the actual or apparent scope of his employment even though the fraud was committed solely for the agent's own benefit and to the principals. That is, if he is acting within the line and scope of his employment as the agent of Pacific Mutual and commits fraud Pacific Mutual is responsible for the acts or for the fraud of its agent done within the line and scope of his

[Page 891 JURY CHARGE BY COURT]

employment. Even though that fraud was committed solely for the benefit of the agent, Lemmie Ruffin, and to the detriment of his principal Pacific Mutual.

In other words, the principal is responsible for its agent's fraud or misrepresentation. Even though the

principal may have personally received no benefits from it, and it is of consequences that the agent acts entirely for his own purposes and commits a fraud solely for his own benefit, if it is within the line and scope of his employment. Which means Pacific Mutual is only responsible for the fraud of Lemmie Ruffin which he committed acting as their agent within the line and scope of his employment with Pacific Mutual.

Now, implied authority of an agent is authority to do whatever act or use whatever means are reasonably necessary and proper to the accomplishments of the purposes for which the agency was created. That is he would have implied authority to do whatever was necessary, reasonably necessary, and proper for the accomplishment of his goal, which was to sell insurance. Apparent authority for which a principal is responsible to a third person for the

[Page 892 JURY CHARGE BY COURT]

act of his agent. [sic] that is the principal is responsible to that third person, which would be the plaintiffs in this case, for the acts of his agent, Lemmie Ruffin. Is that authority which arises when the principal by his acts, word or conduct reasonably interpreted causes such third person to believe that authority has been given to an agent to act on his behalf and such authority cannot be established solely by the acts of the agent. That is the principal must close that principal rule with certain authority which to the reasonable person would give that impression that that person was acting on behalf of that particular principal.

Now, the agency is suspended, that is it is cut off during the time of the abandonment by the agent of the principal's business. In other words, ladies and

gentlemen, if during this course of conduct Lemmie Ruffin ceases to be the agent of Pacific Mutual, is no longer their agent, but is working and that is its reasonably from the circumstances, that is interpreted as that. That is he had abandoned Pacific Mutual as his principal and has taken on another principal, another insurance

[Page 893 JURY CHARGE BY COURT]

company, that has been mentioned in this, and commits a fraud while acting on behalf of the other insurance company, not Pacific Mutual, he has abandoned Pacific Mutual, and to the reasonable person it is apparent that he has abandoned Pacific Mutual, then Pacific Mutual is not liable for the acts of Lemmie Ruffin committed while he was acting without the line and scope of his employment of Pacific Mutual. That is he is acting on behalf of someone else.

Simply put, Pacific Mutual Life Insurance Company is responsible for the acts of Lemmie Ruffin which he committed as an agent of Pacific Mutual, acting within the line and scope of his authority as the agent of Pacific Mutual. So, that is if he was acting as a Pacific Mutual agent — even though he committed fraud which was against the directions of his principals they're responsible for those acts. If at the same time he perpetrated those acts he was acting as Pacific Mutual Life Insurance Company's agent, and it was reasonably apparent to the public that he was in fact acting as their — if in fact he had abandoned that relationship, the agency principal, the agent relationship between Pacific

[Page 894 JURY CHARGE BY COURT]

Mutual and himself, and it was reasonably apparent to

everyone that he was acting on behalf of another, then Pacific Mutual cannot be held responsible for his acts committed as an agent or within the line and scope of employment of someone else, another insurance agency, and I can't call their names right now, but you have heard them, you remember, Union Fidelity and John Alden, I think were the names.

So, you must be reasonably satisfied, in order to find Pacific Mutual liable for fraud to these plaintiffs you must be reasonably satisfied that one, a fraud was committed by Lemmie Ruffin or other agents of Pacific Mutual, and that that fraud was committed by that agent while acting within the line and scope of their employment with Pacific Mutual Life Insurance Company. Even though fraud was not sanctioned by Liberty Mutual, I mean by Pacific Mutual, they are still responsible for the acts of the agents committed while acting within the line and scope of the employment.

Now, if after full and fair consideration of all the evidence in this case you are reasonably satisfied from the evidence that one or both of the

[Page 895 JURY CHARGE BY COURT]

defendants, that is either Lemmie Ruffin or Lemmie Ruffin and Pacific Mutual Life Insurance Company, is guilty of fraud, I used the word guilty again, is liable for the fraud to these plaintiffs, to one or more of the plaintiffs, then you must assess, you must find for that particular plaintiff and assess damages.

Damages is a money award which the law says you should award the plaintiffs. [sic] One, to reasonably compensate that plaintiff for the loss that they sustained. Two, in a case of fraud, if you find fraud, you may at

your discretion award, what is known as punitive damages.

Now, the burden of proof is upon the plaintiffs, again not only to prove the allegations of the complaint or to prove that a fraud had been perpetrated upon them by one or both defendants, but that they were damaged and that the damage was the direct result of the fraud. That is, as a direct or proximate result of the fraud by one or both of the defendants the plaintiffs were in fact damaged. If you are reasonably satisfied of both of those, fraud was perpetrated or committed, second, the plaintiffs

[Page 896 JURY CHARGE BY COURT]

were injured as a direct result of that, then you must assess damages.

Damages in fraud cases are twofold. One is compensatory, that is you should award the plaintiff, and of course you know there is four, I won't go down each one but whichever case you're taking up whatever plaintiff's case, and you find that that plaintiff should be awarded a judgment then that particular plaintiff, you should award that particular plaintiff whatever amount of money that person expended, out of pocket expense as a direct or proximate result of the fraud.

Second, you should award as part of compensatory damages, you should award that plaintiff damages which you feel would reasonably compensate that plaintiff for any mental anguish or mental suffering, embarrassment, humiliation, [sic] et cetera, which they received as — which was inflicted upon them as a direct or proximate result of the fraud.

Now, the out of pocket expense is, you can't guess about that. You have heard the evidence that a certain

amount of money which they were out. The mental anguish and other elements there is no

[Page 897 JURY CHARGE BY COURT]

formula for you to pull out, in other words there is no set figure. It's a figure which should not be based on bias or sympathy, just imagination, or picked out of the air. It should be a figure which would reasonably compensate the plaintiffs for whatever damage you feel was inflicted upon them, to reasonably compensate.

Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to

[Page 898 JURY CHARGE BY COURT]

compensatory damages you may in your discretion award punitive damages.

Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public

by deterring [sic] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so.

Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.

So, if you feel that the plaintiff should prevail against one or both of the defendants then you should award compensatory damages and in addition to that, which you feel would reasonably compensate the plaintiffs for the loss, compensatory loss, in this case, and in addition you may in your discretion—

[Page 899 JURY CHARGE BY COURT]

award punitive damages. I have just told you the purpose of punitive damages.

Now, there are four verdicts. There are four verdicts you will return, there are three possible verdicts that correspond with the four plaintiffs, and there are three possible verdicts in each of the plaintiffs' cases. You could find in favor of the plaintiff against both defendants. You could find in favor of both defendants and against the plaintiffs. You could also find in favor of plaintiffs against one of the defendants and in favor of the other.

Now, only one way can you do that. You could find, you could under the evidence if you are reasonably satisfied that Lemmie Ruffin committed fraud, then you should find a verdict against him. However, if you are not reasonably satisfied at the time Lemmie Ruffin committed the fraud that he was acting as an agent of Pacific

Mutual Life Insurance Company, but was acting on behalf of another or without the line and scope of his employment of Pacific Mutual Life Insurance Company, then you must find in favor of them. So, you would find against

[Page 900 JURY CHARGE BY COURT]

Lemmie Ruffin and in favor of Pacific Mutual if that were your verdict.

You cannot find against Pacific Mutual Life Insurance Company and in favor of Lemmie Ruffin under the evidence in this case. In other words, if you find against Pacific Mutual you have got to find against Lemmie Ruffin. The reverse is not true if you find against Lemmie Ruffin, you don't necessarily have to find against Pacific Mutual. You would have to believe from the evidence, be reasonably satisfied, that Lemmie Ruffin was acting within the line and scope of his employment.

So, there are three possible verdicts in each case. Let me go over it just briefly for each plaintiff. Cleopatra Haslip versus these defendants. If after a full and fair consideration of all the evidence in this case you are reasonably satisfied from the evidence that Lemmie Ruffin committed a fraud, and I have given you the element, I won't go over that again, I have given you the elements of fraud, that Lemmie Ruffin committed a fraud and that at the time he committed the fraud he was acting as an agent within the line and scope of his employment

[Page 901 JURY CHARGE BY COURT]

with Pacific Mutual Life Insurance Company and as a direct result of that fraud he, Cleopatra Haslip was injured, then the form of your verdict will be we, the jury, find in favor of the plaintiff, Cleopatra Haslip, and against the defendant, Lemmie Ruffin, Jr. and Lemmie L. Ruffin, Jr. doing business as L. L. Ruffin Insurance Agency and Pacific Mutual Life Insurance Company, that is a verdict against both defendants, and assess the plaintiff's damages at blank, and that blank would be filled in by the jury with an amount of money which would include compensatory damages. That amount of money which you feel would reasonably compensate the plaintiffs for the compensatory damages in this case, and I have gone over that.

And if in your discretion you should award an amount of punitive adammages [*sic*] you would include that in this award and that would be filled in by the jury and the figure you just write it out.

If after the same full and fair consideration of all the evidence in this case you are reasonably satisfied from the evidence that Lemmie Ruffin was guilty of fraud and as a direct

[Page 902 JURY CHARGE BY COURT]

result of that fraud, and I used the word guilty again and I try not to do that, committed fraud and as a result of that Cleopatra Haslip was injured. However, you are not reasonably satisfied from the evidence that Lemmie Ruffin at the time he committed fraud upon her was acting within the line and scope of his employment with Pacific Mutual Life Insurance Company, then the form of your verdict would be, we the jury find in favor of the

plaintiff, Cleopatra Haslip and against the following defendants. It would be Lemmie Ruffin here, and assess the plaintiff's damages at that amount of money. Whatever that amount of money would be, would be compensatory and/or punitive. We further find in favor of the following defendant, and that would be Pacific Mutual.

If this were your verdict, and we probably ought to fill, [*sic*] the only way you could return this verdict would be against Lemmie Ruffin and in favor of Pacific Mutual. In other words you would find this verdict, would be finding against Lemmie Ruffin and in favor of Pacific Mutual. Of course the other possible verdict would be after a full and fair

[Page 903 JURY CHARGE BY COURT]

consideration of all the evidence in this case you are not reasonably satisfied that fraud was committed by anyone or that the plaintiff, Cleopatra Haslip was injured as a direct result of it.

Another form of your verdict would be, we the jury find in favor of the defendant Lemmie L. Ruffin and Lemmie Ruffin doing business as L. L. Ruffin Insurance Agency and Pacific Mutual Life Insurance Company and against the plaintiff, Cleopatra Haslip, that would just be a verdict in favor of both defendants.

That is true of each and every one of these, the same would be true. Now, you don't have to find in favor of every — in other words, you could find in favor of some plaintiffs and against others. You may find that you may be reasonably satisfied that one or more of the plaintiffs was not injured as a direct result of the action. Even if fraud was committed you may fail to be reasonably satisfied that that particular plaintiff was injured. You may find that that particular plaintiff did not — if there

was any representation, even though they were false that particular plaintiff did not rely upon it.

[Page 904 JURY CHARGE BY COURT]

So, what I am saying is you don't have to find against all the plaintiffs or in favor, they don't have to be consist, [sic] the plaintiffs [sic] verdicts don't have to be consistent from the evidence. I mean you go from the evidence if you find from the evidence or you are reasonably satisfied from the evidence all four plaintiffs should recover for one or both of the defendants then you return a verdict in favor of four plaintiffs. If you are not reasonably satisfied that any of plaintiffs should recover, you find in favor of the defendant and against all the plaintiffs.

If you are reasonably satisfied that some of the plaintiffs should recover but others should not, then you find in that. What I am saying is the verdict forms are consistent. In other words there is a verdict in favor of each plaintiff and against both defendants, and each plaintiff against one defendant and in favor of the other and each against each plaintiff in favor of both defendants.

Now, whichever of these verdicts you return of these four verdicts returned, they must be unanimous. Ladies and gentlemen, that means all of you must agree to it. It doesn't mean a majority

[Page 905 JURY CHARGE BY COURT]

vote, it doesn't mean eleven out of twelve, it means all of you. That doesn't mean you have to go back there and just as soon as you get back there take a vote and everybody raise their hand at the same time and instantaneously agree to it, it doesn't mean that.

You haven't discussed this case with anyone during the course of this trial. You haven't talked about it with each. [sic] You are now going to talk about it for the first time. Some of you may have heard the evidence different from others. Some of you may receive evidence different. In other words, one witness, I mean one juror may say, well, I don't believe this, and another one say, yes, I do. Well, you deliberate, you exchange ideas, you draw upon each other's experiences and each fellow juror's experiences, your common sense and their common sense. You deliberate, you talk to each other, you listen to each other.

But when I say the verdict must be unanimous I do mean this, that when the foreperson of the jury comes into the court and says that the jury has reached a verdict, I will line you up behind that rail and I will ask the foreerpson [sic] to read the

[Page 906 JURY CHARGE BY COURT]

verdict and that person does when that verdict is read each and every member of this jury must agree with it. That is, you must be prepared, and I will ask you once the verdicts are read, I will ask each and every juror if that is your verdict and you must say yes in order for me to receive it. If one says no, then you go back and keep delierating. [sic]

Select one of your nubmer [sic] to served as the foreperson of the jury. That person, I suggest may be, you wouldn't have to do it this way because nobody is going to ask you what you do while it is going on or after it is over, but I suggest maybe the best time to do it is at the beginning. First thing you do is select a foreperson. Again, that is just my suggestion to you. You don't have to do it that way. But you have got to

select a foreperson sometime during the deliberation that person — the reason I say it may be, the outset is a good time to do it, because you have a person who kind of sets the format of the deliberations, keep them orderly, whatever. That person would sign his or her name to the four different forms which correctly reflect the verdict of the entire jury. That person would serve

* * * *



PACIFIC MUTUAL

PACIFIC MUTUAL LIFE INSURANCE COMPANY
HOME OFFICE NEWPORT BEACH, CA 92660
TEL (714) 640-3011

UNION FIDELITY

DEDUCTIBLE

\$100 - waived for accident & hospital,
maximum of 2 deductibles per family per
calendar year

CO-INSURANCE

Plan pays 80% of 1st \$5,000, accumulation
period 5 yrs.; after \$5,000 of expenses
pays 100% until end of 5th calendar year,
deductible will apply in each year.

ROOM & BOARD

Semi-private rate

INTENSIVE CARE

3 times room & board rate

EXTENDED CARE

1/2 room & board rate

MENTAL OR NERVOUS DISORDER

\$10,000 maximum per cause, 50% co-insurance
for outpatient mental illness, maximum pay-
ment for out-of-hospital psychiatric treat-
ments \$12.50 per visit, limit one visit per
week

PLAN MAXIMUM

\$1,000,000 per person

PER CAUSE MAXIMUM

\$250,000 per person

EXTENDED FAMILY COVERAGE

Upon death of insured employee his family's
coverage will be extended up to 3 years with
payment of premium for the surviving spouse
or surviving spouse and children

DOCTOR VISITS, SURGERY
ANESTHESIA, RADIOTHERAPY
DIAGNOSTIC LAB, X-RAYS

Usual, reasonable & customary

AMBULANCE, NURSING,
APPLIANCES, HOSPITAL EXTRAS

Usual, reasonable & customary

LIFE INSURANCE

Included in program

PRE-EXISTING CONDITIONS

Any sickness or injury for which doctor
treatment, hospital treatment or medication
was received or distinct symptoms were evident
during 12 months prior to the effective date
will not be covered until insured for 12 months
from the effective date. For those insured
under a previous carrier there will be up to
\$1,000 of benefits paid equal to the lesser
of the benefits payable under their previous
coverage or the benefits payable under this
policy up to a maximum of \$1,000 for the
pre-existing condition.

PLAINTIFF'S
EXHIBIT

CO-ORDINATION OF BENEFITS

Benefits will be co-ordinated with any
other group type hospital and medical plans
union welfare plans, and government programs

JA-113

PLAINTIFF'S
EXHIBIT

7

ROOSEVELT CITY

Employee: \$49.68

Employee plus dependents: \$105.90

There is a \$10.00 monthly administration fee.

These rates are subject to final enrollment if actual enrollment varies significantly from the proposed enrollment.

Rates are guaranteed for six months from the effective date of the master policy.

Eddie Hargrove	7.20
Cynthia Craig	19.68
Alma Calhoun	105.90
Cynthia Hargrove	105.90
TOTAL	238.68
Pay this amount	238.68

DECLARATION
C. Hargrove
Alma Calhoun
Cynthia Hargrove
Cynthia Craig

JA-114



DEPARTMENT OF THE ARMY

JA-115



WILLIAM L. HARGROVE

WILLIAM L. HARGROVE COMPANY

WILLIAM L. HARGROVE
WILLIAM L. HARGROVE
WILLIAM L. HARGROVE

December 7, 1937

Mrs. Poindexter
City of Roosevelt
4543 Bessemer Super Hwy.
Roosevelt City, AL 5600

Dear Mrs. Poindexter,

Your premiums are now due for December. Please forward a check in the amount of \$268.68. Thank you.

Eddie Hargrove	7.20
Cynthia Craig	49.68
Alma Calhoun	105.90
Cleopatra Haslip	<u>105.90</u>
TOTAL	268.68

Sincerely,

Lennie L. Ruffin

LR/dar

JA-116



PACIFIC MUTUAL

PACIFIC MUTUAL LIFE INSURANCE COMPANY

BIRMINGHAM LUNA AGENCY
THE TOWERS SUITE 400 EAST
AND ALCON PARKWAY WEST
BIRMINGHAM ALABAMA 35203
TELEPHONE (205) 942-6438

January 5, 1982

Mrs. Poindexter
City of Roosevelt
4543 Bessemer Super Hwy.
Roosevelt City, AL 35020

Dear Mrs. Poindexter,

Your premiums are now due for January. Please forward a check in the amount of \$268.68. Thank you.

Eddie Hargrove	7.20
Cynthia Craig	49.68
Alma Calhoun	105.90
Cleopatra Haslip	<u>105.90</u>
TOTAL	268.68

Sincerely,

Lemmie L. Ruffin

LLR/dla

JA-117



PACIFIC MUTUAL

PACIFIC MUTUAL LIFE INSURANCE COMPANY
HOME OFFICE: NEWPORT BEACH, CA 92660
TEL. (714) 640-3011

ROOSEVELT CITY

Employee: \$49.68

Employee plus dependents: \$105.90

There is a \$10.00 monthly administration fee.

These rates are subject to final enrollment ^{if} actual enrollment varies significantly from the proposed enrollment.

Rates are guaranteed for six months from the effective date of the master policy.

[Handwritten signature]

JA-118



Underwritten by

UNION FIDELITY LIFE INSURANCE COMPANY
Tulsa, Pennsylvania

October 7, 1981

Mr. Lemmie Lee Ruffin Jr.
Pacific Mutual Birmingham Lupia Agency
530 Beacon Parkway West Ste. #400
Birmingham, AL 35209

Re: City of Roosevelt
FLAG CASE # 1001288

Dear Mr. Ruffin:

We are pleased to enclose herewith the Administration Kit, Certificates of Insurance, and Employee Identification Cards for those insured employees covered under the captioned employer-unit coverage. We trust that you will make arrangements to deliver this promptly to your client and that you will take that opportunity to review the Administration Guide with them at that time.

If you have any questions about any of the material being sent to you, or if we can be of any service to you or your new FLAG client, please feel free to contact our office at any time. We are as close as your telephone for your immediate needs. Our WATS number is (800) 255-6029.

Thank you for having placed this coverage in the insurance program available to the Federated League of Associated Groups Trust. We will do our utmost to give you and your client the very best possible service.

Kindest regards,

Ralph S. Passman

RSP/ce

Enclosure(s)

cc: MD - Patrick Lupia
Tim McCoy & Assoc.
Employer - City of Roosevelt

MARKETED BY

TIM MC COY & ASSOCIATES

P.O. BOX 3409

AUSTIN, TEXAS 78764

TELEPHONE 512/443-1512

DEPOSITION
EXHIBIT

36 1/19/87

JA-119

RALPH S. PASSMAN & ASSOCIATES, INC.
INSURANCE MARKETING & ADMINISTRATION

4200 SOMERSET DRIVE

PRAIRIE VILLAGE, KANSAS 66208

TELEPHONE 913/383-3883

RSP/A

RECEIVED

OCT 23 1981

LEGAL MARKETING DIV

TERMINATED CASE MASTER FILE AS OF 01/08/82

(TERMINATION IS EFFECTIVE THE DAY FOLLOWING THE 'PAID THRU' DATE)

NUMBER.....1001288

NAME.....CITY OF ROOSEVELT
ADDR-LINE 1.....C/O MR. PAT LUPJA
ADDR-LINE 2.....530 BEACON PKWY W #400
CITY/STATE/ZIP..BIRMINGHAM, AL 35209

INCEPTION DATE., 09/01/81
TRUST #.....000000001
AREA CODE.....2

PAID THRU.....09/30/81
LAST BL'G DATE..12/7/78

ADD'L ADM FEES.....0

CURRENTLY DUE... .00
PAST DUE AMOUNT. .00
UNPAID LIFE PORTION... 80.10
PAID IN ADV PREMIUMS... .00
UNPAID ADM FEES..... .00

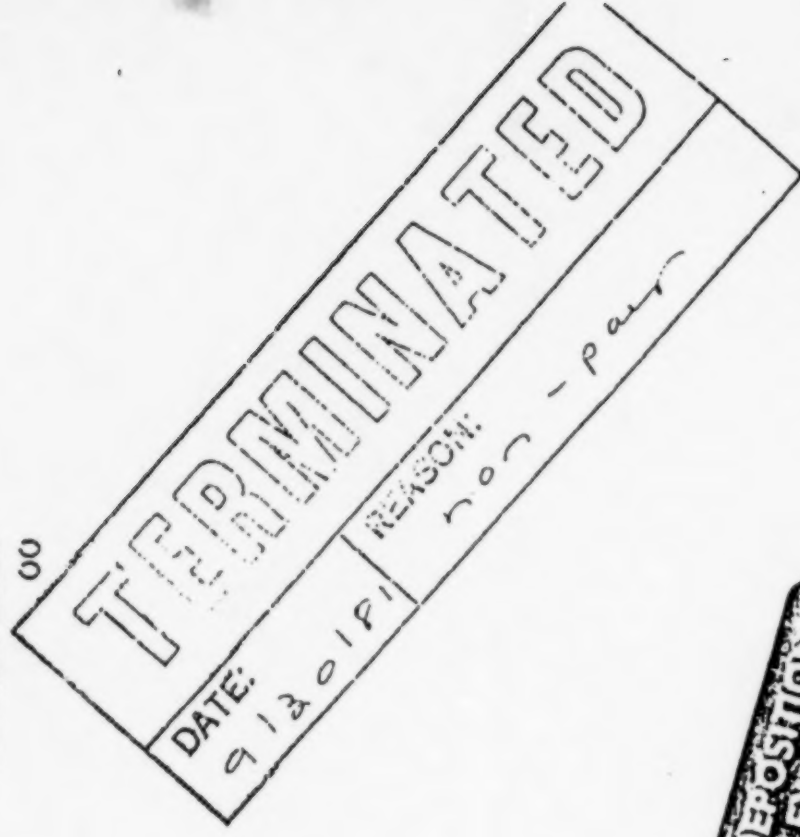
DUE DATE.....01 RATE INCREASE PRCT.. ##.00 %

INSURING CO.....01 - UNION FIDELITY LIFE
MKT'G FIRM.....755 - PATRICK LUPJA
AGENT.....036492 - LEMMIE L RUFFIN

ADMINISTRATION FEE... 10.00

COMMISSION RATE..... 10 %

PREMIUMS PAID... CURR/MONTH YR/TO/DATE GRAND/TOTAL
.....000000



case 115182 +
2115 trn
to 20

DEPOSITION
EXHIBIT
P's 33
1/19/87

JA-120

BASE MASTER FILE AS OF 10/07/81

NUMBER.....1001288

NAME.....CITY OF ROOSEVELT
 ADDR-LINE 1.....
 ADDR-LINE 2.....4543 BESSEMER SUPER HWY
 CITY/STATE/ZIP..ROOSEVELT, AL 35020

INCEPTION DATE..09/01/81
 TRUST #.....C00000001
 AREA CODE.....2

PAID THRU.....00/00/00
 LAST BL'G DATE..00/00/00

CURRENTLY DUE... 00
 PAST DUE AMOUNT. 00

ADD'L ADM FEES..... 2

UNPAID LIFE PORTION..... 00
 PAID IN ADV PREMIUMS... 00
 UNPAID ADM FEES..... 00

DUE DATE.....01

RATE INCREASE PRCT.. ##.00 %

INSURING CO.....01 - UNION FIDELITY LIFE
 MKT'G DIR.....755 - PATRICK LUPIA
 AGENT.....036492 - LEMMIE L RUFFIN

ADMINISTRATION FEE...10.00

COMMISSION RATE.....10 %

CURR/MONTH

 PREMIUMS PAID... .00

YR/TO/DATE

 .00

GRAND/TOTAL

 .00

10/6/81

*Change of Address
 per letter (income) from gvt 10/6/81
 * For GILLINGS ONLY *
 the gvt address
 Joe New Master*

DEPOSITION
 EXHIBIT
 35
 1/19/87

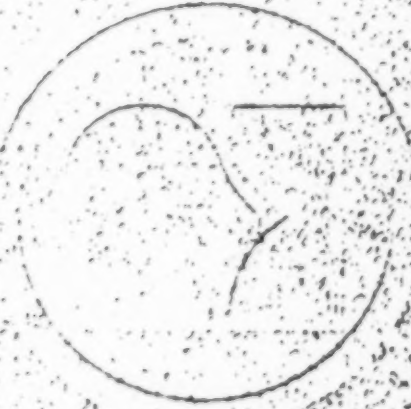
JA-121

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

PLAINTIFF'S
EXHIBIT

- A



PACIFIC MUTUAL

CENTURY CONTRACT

FOR CAREER AGENTS

Pacific Mutual Life Insurance Company (PM)
and

CEMMIE WELSH (Agent)

have agreed that Agent shall become a Career Agent of PM on

MARCH 16, 1980

JA-122

SECTION 1—Agent's Authorities.

Agent is authorized to solicit and take applications for all forms of insurance policies issued by PM within the territory of the agency where appointed. Agent shall immediately deliver to PM all completed applications for insurance.

Agent is authorized to collect the initial premium and no other on insurance policies. All premiums collected by Agent shall be received by him in trust and shall immediately be transmitted in full to PM.

Agent is authorized to deliver insurance policies produced by him. No policy shall be delivered if Agent knows of any material change in the health of any proposed insured. No policy shall be delivered unless the initial premium is collected in full.

Agent is authorized to service insurance policies which have been produced by him or which are assigned to him by PM for servicing.

Agent shall have no authority other than expressly provided in this contract and agrees not to do or attempt to do any of the following:

Incur any expense or liability on account of PM without specific written authority.

Make or alter any policy; extend the time for paying any premium; or waive any provision of any policy.

Use any advertising or sales material, or any form in any way relating to the business of insurance other than those approved by PM.

Participate in the affairs of any other insurance company without the prior written consent of PM.

This contract shall not be construed to create the relationship of employer and employee between PM and Agent, and Agent shall be free to exercise his own judgment in determining the persons he will solicit, and the time, manner, and place of solicitation. Without interfering with Agent's freedom of action, PM may from time to time prescribe rate books, manuals, and rules and regulations which shall be observed by Agent.

SECTION 2—Agent's Compensation.

While this contract is in effect, PM agrees to pay or credit to Agent, on premiums paid to PM on policies produced under this contract, renewal commissions, service commissions, and other compensation provided in the applicable Career Agent's Compensation Schedules and, in addition, first year commissions according to either Method A or Method B described below.

Method A.

First year commissions, except on Deferred Annuity policies, will be calculated by applying the first year commission rate as provided in the applicable Career Agent's Compensation Schedules to the annual mode premium for policies produced under this contract, with such first year commissions being paid or credited in accordance with the actual mode of premium payment for such policy as follows:

Annual Premium Policies: First year commissions will be paid or credited in one lump sum.

Other Premium Modes: First year commissions will be annualized and paid or credited in six equal semi-monthly installments. On termination of a policy prior to payment to PM of the full first year premium the unearned balance of first year commissions will be charged back in six equal semi-monthly installments.

First year commissions on Deferred Annuity policies will be paid as described under Method B.

JA-123

Group and Pension Cases. When a Group or Pension Case is placed in force, commissions will be annualized by taking an estimate of the commissions which will be earned during the first policy year. The annualized first year commission will be paid or credited in six equal semi-monthly installments. The commissions paid or credited will subsequently be adjusted to actual commission earned during the first policy year.

Method B

First year commissions will be paid by applying the first year commission rate as provided in the applicable Agent's Compensation Schedules to first year premiums as they are actually paid to PM.

Except for first year commissions on Deferred Annuity policies which shall be paid solely in accordance with Method B, first year commissions will be paid in accordance with Method A. Unless Agent has initially requested Method B in writing, any subsequent change in the method of payment and the effective date of any such change shall be subject to PM's rules and regulations. PM reserves the right to change or discontinue payment of first year commissions by Method A at any time.

After termination of this contract, PM agrees to pay to Agent if Agent has not violated any provision of this contract the commissions which qualify as "vested" under the terms of the applicable Career Agent's Compensation Schedules. From time to time, PM may substitute new Career Agent's Compensation Schedules for previously issued Schedules. However, no new Schedule will affect policies issued prior to its effective date. PM will undertake to provide Agent with a copy of every new Schedule before its effective date. However, failure of Agent to receive a copy of any new Schedule shall not impair its effectiveness.

The right of Agent or any other person to receive any compensation payable under this contract shall be subordinate to the right of PM to offset and apply such compensation against any indebtedness or liability of Agent to PM.

Agent shall refund to PM all compensation paid to him on premiums which have been refunded by PM.

Agent will be entitled to no compensation on any policy unless his name appears on the application. If more than one agent's name appears on an application, the compensation will be divided equally among all such agents unless otherwise specified on the application.

The compensation provided by this contract shall constitute full payment for all efforts expended and expenses incurred by Agent in his performance under this contract.

While this contract is in effect, Agent will be entitled to no compensation on any policy reinstated ninety days or more after the due date of any unpaid premium unless the application for reinstatement was secured by him. After termination of this contract, Agent shall be entitled to no compensation on any policy reinstated forty-five days or more after the due date of any unpaid premium.

Compensation on any policy which, in the judgment of PM, takes the place of other insurance on the same life (including without limiting the same to conversions and reissues) shall be determined by the rules and regulations of PM.

No further compensation shall be payable under this contract if Agent shall at any time attempt to:

Misappropriate any funds of PM; any general agent of PM; or any applicant or policyholder of PM.

Induce any agent to terminate an agent's contract with PM or with any general agent of PM.

Induce any policyowner to lapse, surrender, or replace in another company a policy issued by PM.

SECTION 3—Termination of Contract.

This contract shall terminate as follows:

Immediately upon the death of Agent.

Upon 10 days written notice given by either party to the other with or without cause.

At the option of PM, immediately upon written notice if Agent shall have failed to comply with any of the provisions of this contract; with any of the rules and regulations of PM; or with any of the laws or regulations of any governing body relating to the performance of this contract.

Before this contract shall have been continuously in effect for 15 years, on the March 15th following the end of the second or any subsequent calendar year after the date of this contract in which the first year commissions (life, health, and group) paid to Agent are less than \$1,500. After this contract shall have been continuously in effect for 15 years, on the March 15th following the end of any calendar year if the average of the first year commissions (life, health, and group) paid to Agent in that and the preceding calendar year is less than \$1,500. The \$1,500 first year commission requirement shall not apply during any period of total disability (of which PM shall be the sole judge) of Agent prior to his age 65.

JA-124

Written notice of termination of this contract shall be given as follows:

If by PM to Agent, by delivery in person to Agent, or by mail addressed to Agent at his last known address.

If by Agent to PM, by delivery in person or by mail to an agency office or the Home Office of PM.

SECTION 4—Miscellaneous Provisions.

This contract is personal to Agent and none of his authorities shall be transferable.

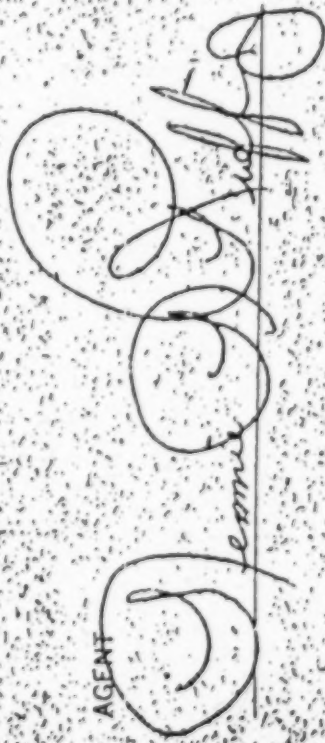
Agent shall not assign any of his rights or interests under this contract without the written consent of PM, and no assignment of any of his rights or interests will be valid without such consent. In all instances, the consent of PM shall be considered to reserve to it the offset rights provided in Section 2 of this contract, whether or not such reservation is expressed in the consent.

Compensation payable after the death of Agent shall be paid to Agent's executor or administrator unless Agent has designated in writing, on a form provided by PM, a person to receive this compensation. Agent may change such designation from time to time but only by filing a written request at the Home Office on a form provided by PM. Any such change shall not take effect until accepted and recorded by PM, but when recorded, whether or not Agent be living, shall take effect as of the date the request was signed.

No failure by PM to enforce any provision of this contract shall affect PM's right thereafter to enforce such provision, nor shall such failure affect its right to enforce any other provision of this contract.

No amendment or modification of this contract shall be valid unless executed in writing by PM.

AGENT



PACIFIC MUTUAL LIFE INSURANCE COMPANY



President



Vice President Agency

Executed by:



Manager, Agents Contracts and Records

(1)

TURN. 362

AGENCY

PLAINTIFF'S
EXHIBIT



19

PACIFIC MUTUAL

PERSONAL HISTORY SUMMARY

CONFIDENTIAL

Name Lemmie Lee Ruffin
(First) (Middle) (Last)

Residence Address 3212 Cedar Ave. S.W. Bham Alabama
(Street and Number) (City) (State)
Length of time at this address 5 years

Previous Address 3517 Ellis Ave. S.W. Birmingham Alabama
(Street and Number) (City) (State)
Length of time at this address 1 1/2 years

Length of residence in community <u>6</u> (Yrs.) <u>6</u> (Mos.)	Date of Birth <u>6-2-55</u>
Telephone Res. <u>925-8169</u> Bus. <u>942-5657</u>	Social Security Number <u>423-76-4807</u>
Verification of previous employment	

JA-126

EDUCATION

TYPE OF SCHOOL	NAME AND LOCATION OF SCHOOL	MAJOR FIELD OF STUDY	MONTHS IN ATTENDANCE	FULL OR PART-TIME	DAY OR NIGHT SCHOOL	YEAR LEFT OR GRADUATED	DEGREE
High School	Middleb High School Midfield Alabama	Diana	18 mo	Full	Day	1973	Associate
College							
Graduate School							
Other Schools or Courses	L.U.T.C. Part I Saford University	L.U.T.C.	9	Part	Day	1978	L.U.T.C.I.

OCCUPATIONAL EXPERIENCE - SINCE LEAVING SCHOOL

FROM	TO	EMPLOYED BY OR OTHERWISE OCCUPIED (GIVE NAME, STREET NO. NUMBER, CITY AND STATE)	EMPLOYED AS	EMPLOYED AT (CITY AND STATE)	MONTHLY EARNINGS	REASON FOR LEAVING
12-78	3-80	Commwealth Ins. Co 2006 BRACON Parkway W. Birmingham Alabama 35209	Agent	Bham AL	1,500	to Gen P.M. terminated for misconducting
2-77	12-78	American National Ins. Co 2926 Central Ave. Birmingham Alabama 35209	Agent STAFF Mgr.	Bham AL	1,500	to go to America
6-73	2-77	America Cast Iron Pipe Co 1637 16th St NO Birmingham Alabama	Iron Rwyer short order cook	Bham AL	550 ²³ 300 ⁰⁰	to go to ACIPC
6-72	6-73	Shoreys Big Boy Restaurant 1057 3rd Ave W. Birmingham Alabama	cook	Bham AL	300 ⁰⁰	to go to ACIPC

(2-78 (2 days only) Stowers Rest at mobile pr
mobile, Alabama

SALES EXPERIENCE

COMPANY	PRODUCT(S) SOLD	DATES EMPLOYED	METHODS OF PROSPECTING (COLD CALLING, REFERRALS, SUPPLIED LEADS, ETC.)	AVERAGE MONTHLY EARNINGS	
				SALARY	COMMISSIONS
American National Insurance		2-25-77	Cold Calling Referrals		1,500.00
Commwealth Insurance		12-4-78	Cold Calling Referrals		1,500.00

Do we have your permission to communicate with your present and past employers in determining your qualifications for the life insurance agent.

Present: YES ☒

NO ☐

Past: YES ☒

NO ☐

JA127

FINANCIAL STATUS

Savings, cash, & checking account
 Automobile, furniture (cash value)
 Real estate (cash value)
 Life insurance (cash value) & investments
 Other (name)
 Total assets

\$ 500.00
 \$ 15,000.00
 \$ 62,500.00
 \$ 500.00
 \$ 78,500.00

Liabilities

Mortgages on home
 Mortgages on other property
 Bills presently due (Car sales, etc.)
 Loans
 Other (name)
 Total liabilities

\$ 17,100.00
 \$ 0.00
 \$ 6,500.00
 \$ 0.00
 \$ 23,600.00

Net worth (total assets minus total liabilities) \$ 54,900

MONTHLY EXPENSES

Fixed Expenses

Rent or mortgage \$ 161.00
 Car payments \$ 0.00
 Contract payments for furniture, etc. \$ 240.00
 Charge account loan payments \$ 0.00
 Utilities \$ 75.00
 Federal and State Income Taxes \$ 0.00
 Life Insurance \$ 40.00
 Other Insurance (health, auto, etc.) \$ 32.00

Total \$ 548.00

General Expenses

Food \$ 100.00
 Clothing \$ 20.00
 Auto operation \$ 25.00
 Medical-Dental \$ 0.00
 Business Expenses \$ 0.00
 Total \$ 145.00

Miscellaneous Expenses

Entertainment \$ 10.00
 Church & Charities \$ 0.00
 Other (itemize) \$ 0.00
 Total \$ 10.00

Total budget for

2 adults and 2 children \$ 703.00
 less spouse's income \$ 400.00
 less other income \$ 0.00
 Earned monthly income needed \$ 303.00

LIFE INSURANCE OWNED

Company

American National
 Commonwealth

Amount policy

25,000
 30,000

Kind of policy

LP 495
 WL

Year of issue

1978
 1979

Liens against

0
 0

Prem. per year

270.00
 285.00

HOSPITALIZATION AND DISABILITY INSURANCE OWNED

Company

American National

1,000.000

Group

1978

0

165.00

YOUR HEALTH

Please describe any illnesses that you have had in the last five years. NONE

MEMBERSHIPS AND ACTIVITIES

Groups with which you have spent time in the past six months. (Exclude any organization that would indicate race, creed, ancestry, national origin, religion, sex, or marital status.)

NAME OF ORGANIZATION OR GROUP OF WHICH YOU ARE A MEMBER	HOW MUCH TIME SPENT WITH THEM AND OCCASION	OFFICES HELD DURING PAST THREE YEARS
1. none		
2.		
3.		
4.		

REFERENCES In the first 3 spaces below, give the names and addresses of three individuals (not relatives), who know something of your background, who know you well, and to whom this Company may refer. In the bottom 3 spaces, give the names and addresses of 3 people who have a sales or marketing background, who know you, and to whom this Company may refer.

NAME	ADDRESS	OCCUPATION	TELEPHONE
(1) W. L. Williams	1706 - 17th St S.W. Bldg A1	Machine Operator	925-6342
(2) Ralph Bolon	423 Frank Nelson Bldg A	Attorney	328-2463
(3) Timothy Robinson	2316 Euclid Ave	Stock Picker	781-2766
(1)			
(2)			
(3)			

The Federal "Fair Credit Reporting Act" requires us to notify individuals of the fact that an investigative consumer report may be made on them. This notice is given you in compliance with this law.

In connection with your application for an Agent's Contract, a routine investigative consumer report has been requested. This report will include information concerning character, general reputation, personal characteristics and mode of living. This information may be obtained through personal interviews with your friends, neighbors and associates. Should you, as the consumer, desire additional information as to the nature and scope of the investigation you may write to Pacific Mutual Life Insurance Company, Manager, Agents' Contracts and Records.

2-28-80

Date

James H. Duffing
Signature

JA-129

REPORT OF TERMINATION

☒ AGENT ☐ BROKER

SEND IN DUPLICATE TO AGENTS' CONTRACTS AND RECORDS
FOR AGENTS IT IS IMPORTANT TO INCLUDE PRESENT HOME ADDRESS, AND REASON FOR LEAVE OR TERMINATION.

Agency No. 362	General Agent or Manager Lemmie L. Ruffin Jr.	Date July 30, 1982
	I.O. Code Y6X	Present Home Address 3212 Cedar Avenue S. W. Birmingham, Alabama 35221

Termination Agreement Attached <input type="checkbox"/> Form 9431 General Agent <input type="checkbox"/> Form 9430 Mgmt. Agcy.	Effective Date 8/11/82	TERMINAL COMMISSIONS: APPLIES TO AGENTS OF GENERAL AGENTS ONLY
Termination Notice Attached <input type="checkbox"/> Form 9432 General Agent <input checked="" type="checkbox"/> Form 9429 Mgmt. Agcy.	Date 8/11/82	INDIVIDUAL - QUALIFICATION FOR VESTED COMMISSIONS - <input type="checkbox"/> YES \$1,500 1st Yr., Premium Paid During Each Accounting Year <input type="checkbox"/> NO Death or P.T.D. 1/5 Reduction Waived for Qualified Years.
<input type="checkbox"/> DECEASED <input type="checkbox"/> P.T.D.		COMMERCIAL <input type="checkbox"/> YES <input type="checkbox"/> NO
LICENSE CANCELLED <input type="checkbox"/> YES DATE _____ STATE (S) <input type="checkbox"/> RESIDENT <input type="checkbox"/> NON-RESIDENT _____ <input type="checkbox"/> NOT RENEWED <input checked="" type="checkbox"/> NO		*(If yes - indicate years, if any, for which terminal commissions are not payable.)

REASON FOR TERMINATION (Explain Fully - use space below if necessary)

☒ AGENT PERFORMANCE RATING FORM ATTACHED

AGENTS' GROUP PLANS - FORMS ATTACHED:
Group Life - _____ Notice of Conversion Rights under Group Life, Medical and Survivor Income Policy (6122)
Life & Medical - _____ Application for Conversion (GR-9337)

General Agent must Sign

LEAVE REASON

- ☐ 020 Worker's Comp
- ☐ 030 Sick (On-Salary)
- ☐ 031 Sick (Off-Salary)
- ☐ 033 Personal Business (On-Salary)
- ☐ 035 Personal Leave
- ☐ 036 Military Duty
- ☐ 152 Maternity
- ☐ 155 Short Term Disability
- ☐ 999 Other

TERMINATION REASON

- ☐ 01 Dissatisfied with Pay
- ☐ 02 Dissatisfied with Supervisor
- ☐ 03 Dissatisfied with Promotion and Opportunities
- ☐ 04 Dissatisfied with Hours
- ☐ 06 Dissatisfied with Job Content
- ☐ 09 Dissatisfied with Employment Hours
- ☐ 10 Dissatisfied with Company Policy
- ☐ 19 Other Dissatisfaction
- ☐ 20 Illness In Family
- ☐ 21 Health
- ☐ 22 Maternity
- ☐ 23 Marriage
- ☐ 24 Relocation
- ☐ 25 Return to School
- ☐ 26 Military
- ☐ 27 Family Reasons
- ☐ 28 Deceased
- ☐ 29 Retirement
- ☐ 99 Other

JA-130

362 Lemmie L. Ruffin, Jr

T/C TKLyer 7/30/82

Pat is trying to find him a job.

Does not want to cut off his
commissions at this point.

He will get back to me today.

Send Termination notice per Pat Typin 7/30/82
grr

JA-131

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

**CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,**
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONER

Of Counsel:

VICKI W.W. LAI

ADAMS, DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

BRUCE A. BECKMAN

Counsel of Record

ADAMS, DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

OLLIE L. BLAN, Jr.

BERT S. NETTLES

SPAIN, GILLON, GROOMS,
BLAN & NETTLES

2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

J. MARK HART

SPAIN, GILLON, GROOMS,
BLAN & NETTLES

2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

Attorneys for Petitioner
Pacific Mutual Life Insurance Company

PETITION FOR CERTIORARI FILED FEBRUARY 7, 1990
CERTIORARI GRANTED APRIL 2, 1990

QUESTIONS PRESENTED

The following questions are presented by the Petitioner:

1. Whether Alabama law, as applied below, violates Due Process by allowing the jury to award punitive damages as a matter of "moral discretion," without adequate standards as to the amount necessary to punish and deter and without a necessary relationship to the amount of actual harm caused.
2. Whether Alabama law violated Pacific Mutual's right to Due Process under the Fourteenth Amendment by allowing punitive damages to be awarded against it under a *respondeat superior* theory.
3. Whether the amount of punitive damages in this case was excessive, in violation of Pacific Mutual's Due Process right to be free of grossly excessive, disproportionate damages awards.
4. Whether the suit below, although nominally civil, must be considered sufficiently criminal in nature as to the punitive damages awarded therein to entitle Pacific Mutual to certain protections under the Fifth and Fourteenth Amendments to the United States Constitution.
5. Whether Alabama law is discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment, by encouraging disproportionate punishment without rational basis.
6. Whether the constitutional defects in the award of punitive damages against Pacific Mutual were cured by judicial review and the potential for a remittitur.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Pacific Mutual Life Insurance Company states that it is a California mutual insurance company. It has no parent company, non-wholly owned subsidiary or affiliate.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	ix
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. THE PARTIES	2
B. THE ACTION BELOW	3
C. STATEMENT OF FACTS	3
1. Respondents' Prior Coverage	3
2. Mr. Ruffin's Solicitation	3
3. Pacific Mutual Did Not Issue Group Health Policies	4
4. The Separate Applications to Union Fidelity and Pacific Mutual	4
5. Issuance of the Separate Health and Life Policies	4
6. Pacific Mutual's Agents' Contract Forbade Mr. Ruffin's Conduct	5

	Page
7. Cancellation of Union Fidelity's Health Coverage	5
8. Mrs. Haslip's Hospitalization	6
9. The Litigation.	6
a. The Pleadings	6
b. The Trial.	7
c. The Punitive Damage Jury Instructions	7
d. The Verdict	8
e. Pacific Mutual's Appeal	8
f. The Alabama Supreme Court Decision	8
g. Pacific Mutual's Petition for Rehearing	9
SUMMARY OF ARGUMENT.	9
1. Standardless Jury Discretion	9
2. <i>Respondeat Superior</i>	10
3. Excessiveness of the Award	10
4. Criminal Procedural Protections	11
5. Judicial Review Did Not Cure	11

	Page
I. ALABAMA LAW, AS HERE APPLIED, AND PUNITIVE DAMAGES DOCTRINE GENERALLY, VIOLATES DUE PROCESS BY ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES AS A MATTER OF "MORAL DISCRETION," WITHOUT ADEQUATE STANDARDS AS TO THE AMOUNT NECESSARY TO PUNISH AND WITHOUT A NECESSARY RELATIONSHIP TO THE AMOUNT OF ACTUAL HARM CAUSED	12
A. Punitive Damages Are Punishment, Imposed Through State Action, And As Such Are Subject To Due Process Requirements	12
B. The Jury Instruction On Punitive Damages In This Case, Which Conformed To Alabama Law, Gave The Jury Unlimited Discretion To Set The Amount Of Punishment To Be Imposed. This Violated Pacific Mutual's Right To Due Process Under The Fourteenth Amendment	15
1. Basic Due Process Required Adequate Standards To Limit Jury Discretion In Determining The Severity Of Punishment	15

	Page
2. The Jury Instruction In This Case, Which Properly Stated Alabama Law, Was Hopelessly Vague And Incomprehensible As A Basis For Determining Punishment	16
C. The Absence Of Prior Establishment Of The Punishment To Be Imposed On Pacific Mutual For Mr. Ruffin's Conduct Violated Pacific Mutual's Right To Due Process	22
II. ALABAMA LAW VIOLATED PACIFIC MUTUAL'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, BY ALLOWING PUNITIVE DAMAGES TO BE AWARDED AGAINST IT UNDER A <i>RESPONDEAT SUPERIOR</i> THEORY	27
A. The Punitive Damages Award Herein Violated Due Process By Imposing Punishment For Conduct Not Authorized Or Ratified, And Not Performed To Benefit The Principal	28
III. THE AMOUNT OF THE AWARD OF PUNITIVE DAMAGES IN THIS CASE WAS EXCESSIVE, IN VIOLATION OF PACIFIC MUTUAL'S DUE PROCESS RIGHT TO BE FREE OF GROSSLY EXCESSIVE, DISPROPORTIONATE DAMAGES AWARDS	32

	Page
IV. THE SUIT BELOW, ALTHOUGH NOMINALLY CIVIL, MUST BE CONSIDERED CRIMINAL IN NATURE AS TO THE PUNITIVE DAMAGES AWARDED THEREIN, ENTITLING PACIFIC MUTUAL TO PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION	36
A. Beyond A Reasonable Doubt Standard Of Proof	38
B. Unanimous Jury	39
C. Upper Limit On Awards	39
D. Separation In The Order Of Trial Of Liability Issues From Punitive Damages Issues	40
V. ALABAMA PUNITIVE DAMAGES LAW IS DISCRIMINATORY IN VIOLATION OF THE EQUAL PROTECTION CLAUSE, BY ENCOURAGING DISPROPORTIONATE PUNISHMENT, WITHOUT RATIONAL BASIS	40
VI. THE CONSTITUTIONAL DEFECTS IN THE AWARD OF PUNITIVE DAMAGES AGAINST PACIFIC MUTUAL IN THIS CASE WERE NOT CURED BY JUDICIAL REVIEW AND THE POTENTIAL FOR A REMITTITUR	41
CONCLUSION	47

Page

APPENDIX A

PARTIAL LIST OF ALABAMA JURY VER-
DICTS AWARDED PUNITIVE DAMAGES
OF \$500,000 OR MORE A1

APPENDIX B

VARIOUS ALABAMA STATUTORY OF-
FENSES AND CORRESPONDING MAXI-
MUM FINES B1

TABLE OF AUTHORITIES

Page

Cases

A.B. Small Co. v. American Sugar Refining Co. 267 U.S. 233 (1925)	13, 16, 37
Addington v. Texas 441 U.S. 418 (1979)	39
Aetna Life Ins. Co. v. Lavoie 470 So.2d 1060 (Ala. 1984)	12
American Fed. of Labor v. Swing 312 U.S. 321 (1941)	13
Baggett v. Bullitt 377 U.S. 360 (1964)	44
Bankers Life and Casualty Ins. Co. v. Crenshaw 486 U.S. 71 (1988)	18
Bell v. Wolfish 441 U.S. 520 (1979)	12
Bouie v. Columbia 378 U.S. 347 (1964)	23, 42, 45
Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc. 492 U.S. ___, 109 S.Ct. 2909 (1989)	9, 17, 33
Burgess v. Salmon 97 U.S. 381 (1878)	23, 37
Caider v. Bull 3 U.S. (3 Dall.) 386 (1798)	23, 24, 32, 45

	Page
Charter Hospital Of Mobile, Inc. v. Weinberg to be published at 558 So.2d 150, 1990 Ala. Lexis 17 (Jan. 12, 1990). . . .	17, 21, 44, 46
City of Newport v. Fact Concerts, Inc. 453 U.S. 247 (1981).	19
Civil Rights Cases 109 U.S. 3 (1883)	13
Coates v. City of Cincinnati 402 U.S. 611 (1971).	15, 20
Connally v. General Const. Co. 269 U.S. 385 (1926).	15
Coombes v. Getz 285 U.S. 434 (1932).	23
Crowe v. State 485 So.2d 351 (Ala.Cr.App. 1984), <i>rev'd. on other grounds</i> 485 So.2d 373 (Ala. 1985), <i>cert. denied</i> , 477 U.S. 909 (1986).	20
Cummings v. Missouri 71 U.S. (4 Wall) 277 (1867)	23, 37, 40
Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. 155 Cal.App.3d 381 (1984)	19, 20
Dobbert v. Florida 432 U.S. 282 (1977).	24
Dowling v. Garner 195 Ala. 493, 70 So. 150 (Ala. 1915)	17

	Page
Electrical Workers v. Foust 442 U.S. 42 (1979)	18
Ettor v. Tacoma 228 U.S. 148 (1913).	23
Ex Parte Garland 71 U.S. (4 Wall) 333 (1867)	23
Fletcher v. Peck 10 U.S. (6 Cranch) 87 (1810)	23
Furman v. Georgia 408 U.S. 238 (1972).	44
Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974).	14, 18, 35, 41
Giaccio v. Pennsylvania 382 U.S. 399 (1966).	13, 14, 20, 37
Gore v. United States 357 U.S. 386 (1958).	26
Grayned v. City of Rockford 408 U.S. 104 (1972).	15, 42, 45
Greenbelt Coop. Publishing Assn. v. Bresler 398 U.S. 6 (1970)	44
Gregg v. Georgia 428 U.S. 153 (1976).	16, 33
Hammond v. City of Gadsden 493 So.2d 1374 (Ala. 1986)	41-47

	Page
Hogan v. Alabama Power Co. 351 So.2d 1378 (Ala. 1977)	17
How Ah Kow v. Nunan 12 Fed.Cas. 252 (Case 6, 546, 1877).	40
Hughes v. Superior Court Of California 339 U.S. 460 (1950).	25
In Re Paris Air Crash 622 F.2d 1315 (9th Cir. 1980), <i>cert. denied</i> , 449 U.S. 976 (1980)	13, 37
In Re Winship 397 U.S. 358 (1970).	38
Jacobs v. Board of School Commissioners 490 F.2d 601 (7th Cir. 1973).	13
Jenkins v. Werger 564 F.Supp. 806 (D. Wyo. 1983).	20
Jordan v. De George 341 U.S. 223 (1951).	13
Kennedy v. Mendoza-Martinez 372 U.S. 144 (1963).	37
Kolender v. Lawson 461 U.S. 352 (1983).	20
Lanzetta v. New Jersey 306 U.S. 451 (1939).	15

	Page
Livingston v. State 419 So.2d 270 (Ala. Cr. App. 1982)	26
Logan v. Zimmerman Brush Co. 455 U.S. 422 (1982).	31
Marks v. United States 430 U.S. 188 (1977).	22, 23, 42
Mathews v. Eldridge 424 U.S. 319 (1976).	38-40, 46
Miller v. Florida 482 U.S. 423 (1987).	16, 22, 24, 26
Morissette v. United States 342 U.S. 246 (1952).	28
New York Central And Hudson River R.R. Co. v. United States 212 U.S. 481 (1909).	28, 30
Old Dearborn Distributing Co. v. Seagrams-Distillers Corp. 299 U.S. 183 (1936).	41
Papachristou v. City of Jacksonville 405 U.S. 156 (1972).	40
Plyler v. Doe 457 U.S. 202 (1982).	33, 40
Riss & Co. v. United States 262 F.2d 245 (8th Cir. 1958).	28, 30

	Page
Roberts v. United States Jaycees 468 U.S. 609 (1984)	42, 45
Robinson v. California 370 U.S. 660 (1962)	31
Roginsky v. Richardson-Merrell, Inc. 378 F.2d 832 (2d Cir. 1967)	35
Roller v. Holly 176 U.S. 398 (1900)	17
Rookes v. Barnard (1964) A.C. 1129; 1 All Eng. Rept. 367	21
Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971)	14, 18, 41
Rummel v. Estelle 445 U.S. 263 (1980)	47
Shelley v. Kraemer 334 U.S. 1 (1948)	13
Smith v. Goguen 415 U.S. 566 (1974)	20
Smith v. Wade 461 U.S. 30 (1983)	14, 19
Solem v. Helm 463 U.S. 277 (1983)	33-35, 47
Standard Oil Of Texas v. United States 307 F.2d 120 (5th Cir. 1962).	28, 30

	Page
Suits v. State 507 P.2d 1261 (Okla.Crim. 1973)	24
Thompson v. City Of Louisville 362 U.S. 199 (1960)	31
Toole v. Richardson-Merrell, Inc. 251 Cal.App.2d 689 (1967)	35
Travelers Indemnity Co. v. Armstrong 442 N.E.2d 349 (Ind. S.Ct. 1982)	38-39 41
Trop v. Dulles 356 U.S. 86 (1958)	32, 33, 37
Tullidge v. Wade 95 Eng. Rep. 909 (1769).	21
2-D's Logging, Inc. v. Weyerhaeuser Co. 632 P.2d 1319 (Or. 1981)	45
United States v. A & P Trucking Co. 358 U.S. 121 (1958)	28
United States v. Balint 258 U.S. 250 (1922)	28
United States v. Batchelder 442 U.S. 114 (1979)	16, 26
United States v. Cohen Grocery Co 255 U.S. 81 (1921)	15, 45
United States v. Eaton 144 U.S. 677 (1892)	26

	Page
United States ex. rel. Marcus v. Hess 317 U.S. 537 (1943)	32, 37
United States v. Halper 490 U.S. ___, 109 S.Ct. 1892 (1989).	33, 37
United States v. Hudson and Goodwin 11 U.S. (7 Cranch) 32 (1812)	24, 26
United States Trust Co. v. New Jersey 431 U.S. 1 (1977)	23
United States v. Ward 448 U.S. 242 (1980)	33
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. 455 U.S. 489 (1982)	14
Walters v. St. Louis 347 U.S. 231 (1954)	41
Weaver v. Graham 450 U.S. 24 (1981)	22, 23
Williams v. Illinois 399 U.S. 235 (1970)	48
Wisconsin v. Constantineau 400 U.S. 433 (1971)	14
Yick Wo v. Hopkins 118 U.S. 356 (1886)	25, 40, 45

	Page
United States Constitution	
Article I, § 10[1]	2
Fifth Amendment	1, 10, 13, 22, 36, 37, 40
Sixth Amendment	37
Eighth Amendment	33, 40
Fourteenth Amendment	passim
Federal Statutes	
28 U.S.C. Section 1257(a)	1
42 U.S.C. § 1983	19
State Statutes	
Ala. Code §§ 13A-4-3, 13A-5-12 and 13A-9-41 (1975).	34
Calif. Ins. Code § 4010	2
Colo. Rev. Stat. § 13-25-127(2) (Supp. 1986)	38
Publications	
ALI Model Penal Code, Comment On § 207, Tentative Draft No. 4 (1956).	29
IV Blackstone, <i>Commentaries</i> (1st Ed. Reprint)	20
Campbell, <i>Law Of Sentencing</i> , §§ 1, 2 (1978)	24
Canfield, <i>Corporate Responsibility For Crime</i> 14 Colum.L.Rev. 469 (1914).	29

	Page
Clark, <i>Handbook of Criminal Law</i> (1st Ed. 1984) . . . . .	.26
Francis, <i>Criminal Responsibility Of Corporations</i> , 18 Ill.L.Rev. 305 (1924) . . . . .	.29
Jeffries, <i>Legality And Vagueness, And The Construction Of Penal Statutes</i> , 71 Va.L.Rev. 189 (1985) . . . . .	.26
Mueller, <i>Mens Rea And The Corporation</i> , 19 U.Pitts.L.Rev. 21 (1957) . . . . .	.29
Note, <i>Corporate Criminal Liability For Acts In Violation Of Company Policy</i> , 50 Geo. L.J. 547 (1962) . . . . .	.29
Perkins, <i>Criminal Law</i> (2d Ed. 1969) . . . . .	.29
Pound, <i>Criminal Justice In America</i> (1951) . . . . .	.24
Rich, <i>Law And The Administration Of Justice</i> (1975) . . . . .	.24
2 L. Schlueter and K. Redden, <i>Punitive Damages</i> (2d Ed. 1989) . . . . .	.12
Tomas, <i>The Penal Equation</i> (1978)] . . . . .	.24
Wharton, <i>Criminal Law</i> , § 9 (1978) . . . . .	.24
Willis, <i>Measure of Damages When Property Is Wrongfully Taken By An Individual</i> , 22 Harv.L.Rev. 419 (1909) . . . . .	.36

PETITIONER'S BRIEF ON THE MERITS

Pacific Mutual Life Insurance Company ("Pacific Mutual") respectfully submits its brief on the merits as follows:

OPINIONS BELOW

The opinion of the Jefferson Circuit Court is unreported. [Pet. App. A1-A16.]¹ The opinion of the Supreme Court of Alabama [Pet. App. B1-B16] is reported as *Pacific Mutual Life Ins. Co. v. Cleopatra Haslip, et al.*, No. 87-482 (Sept. 15, 1989) (to be reported at 553 So.2d 537 (1990)).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

The judgment of the Supreme Court of Alabama was entered on September 15, 1989. A timely petition for rehearing was denied on November 9, 1989. [Pet. App. C1.] On December 22, 1989 Justice Kennedy issued an order granting Pacific Mutual's application for stay, which was confirmed by the full Court on January 8, 1990. [Pet. App. E1.]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

¹ Documents in the Appendix to the Petition will be cited "Pet. App.," those in the Petitioner's Reply to Respondents' Brief in Opposition "Pet. Reply Cert.," and those in the Joint Appendix "JA."

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment, Section 1, of the United States Constitution provides in relevant part:

"... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Article I, § 10[1], of the United States Constitution provides in part:

"No state shall . . . pass any . . . ex post facto Law . . ."

STATEMENT OF THE CASE

A. THE PARTIES

Petitioner Pacific Mutual is a mutual life insurance company, owned by its policyholders [Calif. Ins. Code § 4010].

Respondents Cleopatra Haslip, Cynthia Craig, Alma Calhoun and Eddie Hargrove ("respondents") are employees of the City of Roosevelt ("the City") in the State of Alabama. Respondents were participants in an insurance plan sponsored by the City in which Pacific Mutual provided individual life insurance coverage.

B. THE ACTION BELOW

Respondents' action against Pacific Mutual involved a suit seeking punitive damages for the misconduct of one of Pacific Mutual's nonexclusive soliciting agents, Lemmie L. Ruffin, Jr. ("Mr. Ruffin"), who at the time of the alleged acts was acting on behalf of another company, Union Fidelity Life Insurance Company ("Union Fidelity") with respect to a health insurance policy issued by Union Fidelity, not Pacific Mutual. [RT 470-75.]²

Pacific Mutual, in an amendment to answer, raised the federal constitutional challenges presented here. [JA 11-14, 25-27, 29-35.] The jury found Pacific Mutual to be vicariously liable for punitive damages for Mr. Ruffin's acts. Pacific Mutual renewed its constitutional challenges by a motion for directed verdict [JA 37-44], and by a post-trial motion [CT 277-325].

Pacific Mutual appealed, again raising its federal constitutional challenges, which were rejected in the opinion of the Alabama Supreme Court affirming the trial court judgment. [Pet. App. B1.] Pacific Mutual petitioned for rehearing, which was denied. [Pet. App. C1.]

C. STATEMENT OF FACTS

1. Respondents' Prior Coverage

Respondents are employees of the City of Roosevelt. The City allowed its employees to purchase a group health insurance policy through the municipality. [RT 91.]

2. Mr. Ruffin's Solicitation

Sometime in 1981, Mr. Ruffin, who was then a soliciting agent for both Pacific Mutual and Union Fidelity, forwarded a mail solicitation to the City [RT 431-32], and later met with the City's mayor, city attorney and city clerk. [RT 92,

² The Clerk's Transcript will hereinafter be designated as "CT." The Reporter's Transcript of the proceeding will hereinafter be designated as "RT."

96, 132, 431-32.] Mr. Ruffin presented his Pacific Mutual business card and discussed the City's interest in obtaining health and life insurance. [RT 92-93, 96, 98-99, 429, 435-36.]

3. Pacific Mutual Did Not Issue Group Health Policies

While Pacific Mutual issued individual life policies to City employees, it did not underwrite group health insurance policies for municipalities. [RT 442-43.] Pacific Mutual did, however, allow its agents to broker business with other insurance companies. [RT 469-70.] Mr. Ruffin at that time was also a licensed agent of Union Fidelity. Union Fidelity, a separate and distinct company from Pacific Mutual, did issue group health insurance to municipalities. [RT 262-63.]

4. The Separate Applications to Union Fidelity and Pacific Mutual

Mr. Ruffin submitted a proposal to the City indicating he would place life insurance with Pacific Mutual and health insurance with Union Fidelity. [RT 439, 442-43, 473, 475-76.] The City approved the proposals, and on August 19, 1981, Mr. Ruffin completed separate applications for the City and its employees for group health coverage with Union Fidelity and individual life policies with Pacific Mutual. [RT 219-21, 283, 312-16, 335.] Mr. Ruffin then submitted the City's application for health insurance to Union Fidelity. The City's application for life insurance was submitted to Pacific Mutual. Pacific Mutual and Union Fidelity are separate companies without any affiliation. [RT 262-63.]

5. Issuance of the Separate Health and Life Policies

Union Fidelity approved the health application and issued group health coverage to the City effective September 1, 1981. [RT 255.] Union Fidelity later confirmed the health coverage by letter with the city clerk. [RT 138-39.] Pacific Mutual approved the applications for individual life insurance and began issuing life insurance coverage to the City's employees. The premium checks for both the life and health

insurance policies were collected by Mr. Ruffin. [RT 115-16, 141-42.]

6. Pacific Mutual's Agents' Contract Forbade Mr. Ruffin's Conduct

An arrangement was made with Union Fidelity to have premium billings sent to Mr. Ruffin at his office in the Pacific Mutual branch office in Birmingham. [RT 271.] Under Mr. Ruffin's sales agent's contract with Pacific Mutual, Mr. Ruffin was specifically forbidden from collecting any premiums beyond the initial premium submitted with the application. [JA 122-25.] Nevertheless, Mr. Ruffin instructed the city clerk to make all premium checks payable to him and to remit the premiums directly to him. [RT 141.]

Pacific Mutual's agent in charge of the Birmingham office, Patrick Lupia, was also licensed with Union Fidelity and other companies. [RT 741.] Mr. Lupia was unaware Mr. Ruffin was collecting premium checks from the City or having the premium checks made payable to him individually. [JA 83-84.] It appears that Mr. Ruffin failed to remit premiums received by him from the City to Union Fidelity. Union Fidelity sent lapse notices to respondents in care of Mr. Ruffin and Mr. Lupia. Mr. Ruffin apparently did not forward them to respondents. [RT 143, 147, 161-62, 256, 270.]

7. Cancellation of Union Fidelity's Health Coverage

In the fall of 1981, the Union Fidelity health coverage for the City was cancelled. Shortly thereafter, Mr. Ruffin attempted to obtain replacement health insurance coverage for the City's employees. [RT 454-56, 479.] He appears to have submitted applications therefor to Union Fidelity and to John Alden Insurance Company. [RT 455, 456, 479.] Mr. Ruffin's deposition testimony, which was read at trial, was that he continued to collect the health portion of the premiums so that he would have the premium money to submit to the replacement carrier. [RT 455.] An application for health insurance was submitted by Mr. Ruffin to both

John Alden and Union Fidelity. Mr. Ruffin received preliminary approval and was assigned a case number. [RT 455, 456-58.] However, before a policy was ever issued, respondent Cleopatra Haslip was hospitalized. [Id.]

8. Mrs. Haslip's Hospitalization

Mrs. Haslip was hospitalized for a kidney infection on January 23, 1982 before a replacement policy was ever issued. [RT 455, 456-58.] Mrs. Haslip incurred \$2,500 in hospital bills. Because the hospital could not confirm insurance coverage it required her to pay a cash sum toward her final bill upon her discharge. The hospital records for Mrs. Haslip's hospitalization do not list Pacific Mutual or Union Fidelity as the insurer, but instead list another company, Commercial Insurance Company. A claim for the hospitalization was never filed with Pacific Mutual. [RT 235.]

Mr. Ruffin testified that Mrs. Haslip called him after her discharge, angered about having to write a check to the hospital and demanded her premium payment back. [RT 458-60, 480-82.] With the deletion of Mrs. Haslip, there were not enough participating employees for issuance of the replacement policy, so Union Fidelity issued a premium refund check to Mr. Ruffin, which he said he attempted to tender to the city clerk, who refused to take the check. [RT 460.] Mr. Ruffin then placed the funds into his wife's checking account and did not return the funds to Union Fidelity or Pacific Mutual. [JA 71-72.]

9. The Litigation

a. The Pleadings

Respondents commenced this action on May 25, 1982 in the Jefferson Circuit Court alleging that Mr. Ruffin collected premiums but failed to remit them to the insurers so that respondents' coverage lapsed without their knowledge. The complaint claimed damages against Pacific Mutual and Mr. Ruffin for fraud, breach of contract and bad faith. [JA 3-10.] Union Fidelity was not named as a defendant. Respondents

amended the complaint several times. [JA 11-17, CT 66-68.] Pacific Mutual, in an amended answer, raised federal constitutional challenges to an award of punitive damages. [JA 29-35.]

b. The Trial

The case was submitted to the jury on respondents' fraud claims on both the health and life insurance policies against Pacific Mutual.

c. The Punitive Damage Jury Instructions

Following the trial court's charge on the issue of liability, the jury was instructed that once it determined there was liability for fraud, it could award punitive damages in its discretion. The court charged as follows:

"Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

"This amount of money is awarded to the plaintiff but is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.

"Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as

shown by the evidence and the necessity of preventing similar wrongs." [JA 103-106.]

d. The Verdict

On August 7, 1987 the jury rendered a verdict in favor of each of the respondents and determined that Pacific Mutual was liable for Mr. Ruffin's acts on an apparent authority *respondeat superior* basis, as follows:

Cleopatra Haslip	—	\$1,040,000; ³
Cynthia Craig	—	\$12,400;
Alma Calhoun	—	\$15,290;
Eddie Hargrove	—	\$10,288.

— [CT 342-43.]

Pacific Mutual timely moved for new trial, or in the alternative, judgment notwithstanding the verdict, again raising its constitutional issues, which was denied on December 11, 1987. [Pet. App. A1.]

e. Pacific Mutual's Appeal

Pacific Mutual raised a number of state law grounds of error, and raised each of the constitutional arguments regarding the award of punitive damages set forth in the Questions Presented section, above.

f. The Alabama Supreme Court Decision

The Alabama Supreme Court, in a 5 to 2 decision affirmed the judgment below on September 15, 1989. [Pet. App. B1-B16.]

³ Mrs. Haslip's claim was as to the Union Fidelity health insurance policy. Pacific Mutual was therefore fined on a *respondeat superior* basis with respect to insurance it did not issue. In final argument, Mrs. Haslip claimed actual damages of \$3,923.84, aggregated into a request for compensatory damages of \$200,000, and punitive damages of \$3,000,000 [R.T. pp. 810, 812, 814]. In their reply to Pacific Mutual's Petition For Rehearing before the Alabama Supreme Court, plaintiffs categorized the general verdict as containing a punitive damages award of \$1,040,000. [Pet. Reply Cert. App. C1.]

Justice Maddox and Justice Steagall of the Alabama Supreme Court voted to vacate the punitive damages award, finding that the punitive damages award in this case violated the Due Process Clause of the Fourteenth Amendment. They also concluded that Alabama's judicial review processes did not cure the violation. [Pet. App. B14-B16.]

g. Pacific Mutual's Petition for Rehearing

Pacific Mutual filed a timely petition for rehearing regarding the constitutional validity of punitive damages, citing the concurrences in *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, 492 U.S. ___, 109 S.Ct. 2909 (1989). The Alabama Supreme Court denied that petition by an order dated November 9, 1989. [Pet. App. C1.]

SUMMARY OF ARGUMENT

1. Standardless Jury Discretion. Alabama law for determining the amount of punitive damages, and the jury instruction in this case authorized thereunder, are impermissibly vague and incomprehensible, and therefore void under the Due Process Clause of the Fourteenth Amendment, because they contain no standard for determining the amount to be awarded.

Punitive damages are punishment, and therefore the standard of scrutiny for vagueness should be similar to that in criminal cases. The Due Process rules regarding void-for-vagueness apply in civil actions and apply as to the determination of the severity of punishment.

The jury instruction in this case told the jury that if it chose to punish by an award of punitive damages, in determining the amount it should consider the "character and degree of the wrong" and the "necessity of preventing similar wrongs." The instruction is contentless and hopelessly vague as to (i) under what circumstances punishment is deserved, (ii) the relative degree of punishment to be imposed, and

(iii) the range within which punishment might properly be imposed.

Prior decisions of this Court have incorporated into the Fifth and Fourteenth Amendments the concerns of the Ex Post Facto Clauses as to fair notice of penalty and prohibition of retroactive changes in punishment adverse to the defendant. The punitive damages award here violated this fundamental principle of legality, that punishable conduct be defined and the penalty be set prior to commission of forbidden conduct.

The vagueness of Alabama law was such that no standard at all was supplied to the jury, which was left free to punish selectively and arbitrarily and to give free reign to bias, prejudice and wealth redistribution inclinations, in violation of both Due Process and Equal Protection guarantees of the Fourteenth Amendment.

2. *Respondeat Superior.* Due Process requires that corporations not be punished on a *respondeat superior* basis where, as here, the acts of the agent were not performed in the business of the corporation, with intent to benefit the corporation.

Here, the fraudulent intent of Mr. Ruffin cannot be imputed to Pacific Mutual consistently with Due Process because, at the time Mr. Ruffin diverted the premiums on the Union Fidelity policy, he was acting for himself, with respect to the policy of another company. An agent stealing from the principal cannot be deemed to have been acting with intent to benefit the principal, nor can such theft be a valid basis for punishment under Due Process.

3. Excessiveness of the Award. Civil penalty awards are excessive in violation of Due Process if grossly disproportionate to the harm caused. Here, the award was in excess of \$1,000,000, where actual damages from nonpayment of medical bills under the Union Fidelity policy, for which no claim was ever made, was \$3,923.94. Under any test of excessiveness, the award imposed on Pacific Mutual on an

apparent authority basis for acts of Mr. Ruffin of pocketing premiums, was excessive. If Pacific Mutual was involved in the conduct at all, the premiums were stolen from it. Any award in such circumstances is excessive.

4. Criminal Procedural Protections. Punitive damages are punishment, and in this case, severe punishment. Under the tests to determine the requirements or procedural Due Process, additional trial procedural protections are required to establish the appropriate level of confidence in the result, in view of the risk to defendants in these cases. Such protections, as relevant to this case, are a beyond a reasonable doubt standard of proof, unanimous jury, an upper limit on awards, and bifurcation of the trial to try underlying liability before trial of punitive damages issues.

Failure to accord these protections, other than unanimous jury, to Pacific Mutual at the trial herein, violated Pacific Mutual's right to Due Process and requires vacation of the award.

5. Judicial Review Did Not Cure. The reviewing courts in Alabama had no better standards by which to review the jury award than the jury had in rendering it. The various factors cited by the Alabama Supreme Court to be considered in reviewing punitive damages awards amount to no more than a test of excessiveness. Further, the trial court did not hold a hearing to consider such factors, and the reasons cited by that Court as upholding the award are unrelated to such factors. Judicial review merely transferred standardless discretion to the reviewing courts, to make a judgment upon bases which would have been equally invalid had the court initially set the punishment. It is submitted that the punitive damages award imposed upon Pacific Mutual should be vacated.

I. ALABAMA LAW, AS HERE APPLIED, AND PUNITIVE DAMAGES DOCTRINE GENERALLY, VIOLATES DUE PROCESS BY ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES AS A MATTER OF "MORAL DISCRETION," WITHOUT ADEQUATE STANDARDS AS TO THE AMOUNT NECESSARY TO PUNISH AND WITHOUT A NECESSARY RELATIONSHIP TO THE AMOUNT OF ACTUAL HARM CAUSED

Alabama law and the jury instruction below which that law authorized are impermissibly vague and indefinite regarding the severity of punishment to be imposed in a punitive damages award, in violation of the Due Process Clause of the Fourteenth Amendment.

The Due Process clause of the Fourteenth Amendment provides, "... [N]or shall any state deprive any person of life, liberty, or property, without due process of law ..."

A. Punitive Damages Are Punishment, Imposed Through State Action, And As Such Are Subject To Due Process Requirements.

Punitive damages under Alabama law,⁴ and under the laws of nearly all other states,⁵ are imposed expressly for the purpose of retribution and deterrence. These are punishment purposes [*Bell v. Wolfish*, 441 U.S. 520 (1979)].

State action is present in this case, because actions by state courts and judicial officers, in their official capacities, including enforcement in litigation among private parties, of private agreements, state law, and common law policy, is

⁴ *Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060 (Ala. 1984).

⁵ 2 L. Schlueter and K. Redden, *Punitive Damages* (2d Ed. 1989), pp. 168-270.

state action within the Fourteenth Amendment [*Civil Rights Cases*, 109 U.S. 3, 11, 17 (1883); *American Fed. of Labor v. Swing*, 312 U.S. 321 (1941); *Shelley v. Kraemer*, 334 U.S. 1 (1948)].

State action is further present because the imposition of punitive damages is not a private right, but is a public interest in retribution and deterrence; and plaintiffs in such actions act as private attorneys general in seeking to effect that interest [*In Re Paris Air Crash*, 622 F.2d 1315, 1319-1320 (9th Cir. 1980), *cert. denied* 449 U.S. 976 (1980)].

The fact that the punishment⁶ is imposed in a civil action among private litigants does not insulate the matter from Due Process scrutiny [*A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925); *Jordan v. De George*, 341 U.S. 223, 231 (1951); *Giaccio v. Pennsylvania*, 382 U.S. 399, 401-403 (1966); *Jacobs v. Board of School Commissioners*, 490 F.2d 601, 605 (7th Cir. 1973)].

In *A.B. Small Co. v. American Sugar Refining Co.*, above, an action to recover for the breach of two contracts for the sale of sugar to a dealer, defenses were asserted that the contracts were unlawful as violating the Lever Act, which made unlawful any "unjust or unreasonable ... charge in ... dealing with any necessities," or "to exact any excessive price for necessities." These defenses were successfully demurred to as violating the Due Process Clause of the Fifth Amendment.

In upholding this ruling that the Lever Act violated the plaintiff's Due Process rights in the context of a civil suit, this Court stated, at page 239:

"The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such

⁶ "Punishment" will be used in this brief to refer to the punitive damages goals of retribution and deterrence.

as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases."

The fact that states have chosen to enforce punishment through civil actions by private attorneys general does not affect Constitutional requirements. In *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966), this Court held that the placement of a civil label on a statute did not affect the application of Due Process principles. While economic regulations may be subjected to a less strict vagueness test [*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)], it is submitted that where, as in punitive damages cases, punishment is to be imposed for proscribed conduct, a level of scrutiny should be given similar to that applied to criminal sanctions. As noted in prior decisions of this Court, punitive damages awards are "quasi-criminal,"⁷ "serve the same function as criminal penalties"⁸ and are private fines imposed to punish and deter conduct.⁹ Close scrutiny is additionally appropriate because of the stigma and loss of reputation which attaches to a punitive damages award. [See *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)].

⁷ *Smith v. Wade*, 461 U.S. 30, 59 (1983), Rehnquist, J., dissenting.

⁸ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-84 (1971), Marshall, J., dissenting.

⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

B. The Jury Instruction On Punitive Damages In This Case, Which Conformed To Alabama Law, Gave The Jury Unlimited Discretion To Set The Amount Of Punishment To Be Imposed. This Violated Pacific Mutual's Right To Due Process Under The Fourteenth Amendment.

Alabama punitive damages law, and the jury instructions it authorized in this case provided no meaningful standards whatsoever for determining the amount of punishment to be imposed. As a result, both the law and jury instruction, which accurately stated it, are impermissibly vague and indefinite. The resulting award against Pacific Mutual is therefore invalid.

1. Basic Due Process Required Adequate Standards To Limit Jury Discretion In Determining The Severity Of Punishment.

Laws forbidding or requiring conduct must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he or she may act accordingly. Vague laws may trap the innocent by not giving fair warning. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Const. Co.*, 269 U.S. 385, 393, 395 (1926); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921)].

In *Grayned v. City of Rockford*, above, this Court stated, at 408 U.S., pages 108-109:

"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

These principles apply as well to the prescription of the range of punishment as to the definition of forbidden or required conduct. [*United States v. Batchelder*, 442 U.S. 114, 123 (1979); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976); *Miller v. Florida*, 482 U.S. 423, 429, 435-436 (1987)]. Where, as here, the range of permissible punishment was not stated in a law to be enforced, this basic policy decision was left to the jury and reviewing judges "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

The same Due Process concerns apply in the case of civil suits involving the consequences of forbidden conduct [*A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925)].

2. The Jury Instruction In This Case, Which Properly Stated Alabama Law, Was Hopelessly Vague And Incomprehensible As A Basis For Determining Punishment.

In this case the trial court charged the jury:

"... [I]f you find fraud, you may in your discretion award what is known as punitive damages.

"...

"This amount of money is awarded to the plaintiff but is not to compensate the plaintiff for any injury. It is to punish the defendant ...

"Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs." [RT 895, 898].

This jury instruction is incomprehensibly vague and indefinite, and told the jury it could do as it pleased. The two criteria stated are contentless and meaningless as stand-

ards for a decision on whether to punish or how much to punish. "The character and degree of the wrong" is hopelessly vague as a basis for determining what conduct deserves punishment under what circumstances. Similarly, "the necessity of preventing similar wrongs" set forth no meaningful basis upon which the jury could decide whether Pacific Mutual deserved punishment, and if so, how much punishment was necessary or appropriate.¹⁰

The jury was left to make these decisions based only upon their biases or visceral reactions arising from their individual temperaments, backgrounds and societal concerns, and were therefore free to punish selectively and give reign to bias, prejudice and wealth distribution tendencies. Due Process must rest on a firmer foundation. [See *Roller v. Holly*, 176 U.S. 398, 409 (1900)].

As stated by Justice Brennan (concurring) regarding a very similar instruction, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. ___, 109 S.Ct. 2909 at page 2923:

"Guidance like this is scarcely better than no guidance at all ... The point is ... that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best."

In this case, which again is typical, the jury was, as noted by Justice Brennan in *Browning-Ferris* [109 S.Ct. 2909 at page 2923], "left largely to [itself] in making this important, and potentially devastating, decision."

¹⁰ Alabama case law recognizes that no legal measure limits this jury discretion [*Dowling v. Garner*, 195 Ala. 493, 70 So. 150 (Ala. 1915); *Hogan v. Alabama Power Co.*, 351 So.2d 1378, 1382 (Ala. 1977); *Charter Hospital Of Mobile, Inc. v. Weinberg*, to be published at 558 So.2d 150, 1990 Ala. Lexis 17 (Jan. 12, 1990), Houston, J., concurring].

This Court has noted the arbitrary and unpredictable results of this unguided discretion in prior decisions.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court invalidated punitive damages under state law standards in defamation cases, and stated, at page 350:

"In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. . . ."

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), Justice Marshall, dissenting, analyzed punitive damages, in a libel case, in terms directly applicable to the Due Process concerns raised here by Pacific Mutual, stating at pages 82-84:

"... This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. . . . These awards are not to compensate victims; they are only windfalls. . . . [N]or is there even any way to determine that the jury has considered the culpability of the conduct involved in the particular case. Thus the essence of the discretion is unpredictability and uncertainty."

In *Electrical Workers v. Foust*, 442 U.S. 42 (1979), this Court banned punitive damages in union representation cases, noting, at page 50, that "the impact of these windfall recoveries is unpredictable and potentially substantial."

In *Bankers Life and Casualty Ins. Co. v. Crenshaw*, 486 U.S. 71 (1988), Justice O'Connor, concurring, noted with respect to the similar law and procedures in Mississippi, at pages 87-88:

"... This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."

In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court banned punitive damages in suits against municipal corporations in 42 U.S.C. § 1983 actions.

In *Smith v. Wade*, 461 U.S. 30 (1983), cogent objections to punitive damages generally were set forth (Rehnquist, J., dissenting).

The concerns regarding punitive damages expressed in the above cases are, it is submitted, Due Process concerns, applicable here.

Because punitive damages awards in large measure depend upon the degree to which the plaintiff's counsel has succeeded in arousing the anger of the jury toward the defendant, the awards, under present procedures, depend upon the idiosyncratic reactions of each jury. This fact, and its consequences, were commented upon in *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381 (1984), as follows, at page 388:

"The process through which a fact finder finds punitive damages is somewhat contradictory. On the one hand, the court or jury must be sufficiently disturbed to conclude the defendant must be punished. On the other hand, although outraged, the fact finder cannot be vindictive. The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns. The process is further complicated by the lack of objective criteria from either the Legislature or

the courts as to 'how much' is necessary to punish and deter." (Emphasis added.)

This is exactly the arbitrary and discriminatory enforcement condemned by Due Process.

Because the decision of whether or not to award punitive damages is committed to the moral discretion of each jury, imposition of such punishment is necessarily arbitrary and unpredictable. *Devlin* recognized that what may outrage one jury, and lead it to award substantial punitive damages, may leave another jury unmoved. The constitutional invalidity of this type of situation was described by this Court in *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) in which this Court stated that many types of behavior can be restricted or even prohibited but not constitutionally, "through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a [law enforcement officer] is annoyed." [See also *Jenkins v. Werger*, 564 F.Supp. 806, 808 (D. Wyo. 1983)].

Neither may juries be allowed to pursue their personal predilections.¹¹ [*Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Smith v. Goguen*, 415 U.S. 566, 575 (1974)].

Juries at common law had no right to determine punishment in a criminal case [see IV Blackstone, *Commentaries*, pp. 354-355, 366-369, 371 (1st Ed. Reprint); *Crowe v. State*,

¹¹ It is recognized that jury sentencing in criminal matters is permitted in some states, and that this court, in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), expressly stated, in footnote 8 at page 405, that it intended in that decision "to cast no doubt whatsoever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." It is submitted that it is the lack of such "legally prescribed limits" which singularize the punitive damages award procedures in this case and render them Constitutionally invalid.

485 So.2d 351, 363-364 (Ala.Cr.App. 1984), *rev'd. on other grounds* 485 So.2d 373 (Ala. 1985), *cert. denied*, 477 U.S. 909 (1986)].¹²

The effect of the arbitrary power given to juries in awarding punitive damages under Alabama law has led an additional justice of that court to rethink his position since the opinions below in this case, in which he voted with the majority.

In *Charter Hospital of Mobile, Inc. v. Weinberg*, 558 So.2d 150, 1990 Ala. Lexis 17 (Jan. 12, 1990), released for publication April 16, 1990, Justice Houston, concurring in the result, which vacated the punitive damages award on state law grounds, appears to have been concerned because of widely differing verdicts in two cases in which he viewed the conduct as being the same. Justice Houston stated, at 1990 Ala. Lexis 17, pages 20-23:

"... I recently noted that, for the same conduct, one insurance company and its special agent were punished by a punitive damages award of \$21,130.86 ... and another insurance company and its special agent were punished by a punitive damages award of \$2,490,000 The instructions given to the juries in those two cases were substantially the same. ... [T]he standard by which the jury is to gauge the amount of punitive damages, if any, that it is to award is incomprehensibly vague and unintelligible. ... Under such a 'standard,' one

¹² The common law right of juries to determine the amount of punitive damages appears in large part to be a result of the perceived inadequacy of the compensatory damages then available to compensate for all detriment, such as emotional distress. See *Tullidge v. Wade*, 95 Eng. Rep. 909 (1769). The vastly expanded scope of civil damages available today invalidates such a consideration. England, in *Rookes v. Barnard* (1964) A.C. 1129, 1221; 1 All Eng. Rept. 367, 411, re-examined punitive damages, and severely limited their availability.

jury can award \$21,130.86 and another \$2,490,000 for the same 'wrong.' This does not comply with the requirement of procedural due process under the Alabama Constitution."

Punishment was imposed upon Pacific Mutual by a jury acting under instructions so vague as to provide no standards at all for determining the relative culpability of Mr. Ruffin's conduct and the amount appropriate to punish Pacific Mutual therefore vicariously. This absence of standards for determining punishment violated Pacific Mutual's right to Due Process under the Fourteenth Amendment.

C. The Absence Of Prior Establishment Of The Punishment To Be Imposed On Pacific Mutual for Mr. Ruffin's Conduct Violated Pacific Mutual's Right to Due Process.

The Due Process Clause of the Fourteenth Amendment requires that permitted punishment be established before commission of the punishable acts. Although prohibition of changes in permitted punishment adverse to the defendant has been the province of the Ex Post Facto Clauses,¹³ prior decisions of this Court have found the concerns of the Ex Post Facto Clauses to be so basic to the concepts of fundamental fairness embodied in the Due Process Clause that those requirements are to be applied through the Due Process Clauses of the Fifth and Fourteenth Amendments.

In *Marks v. United States*, 430 U.S. 188 (1977), this Court held that a substantive change in obscenity standards made by this Court could not be applied to a defendant retroactively, under the Due Process Clause of the Fifth Amendment, stating at pages 191-192 that while the Ex Post Facto Clause applied only to the powers of legislatures, the concept

¹³ See *Weaver v. Graham*, 450 U.S. 24, 30-31 (1981); *Miller v. Florida*, 482 U.S. 423, 429, 435-436 (1987).

of fair warning embodied in it was fundamental to our concept of constitutional liberty.

In *Bouie v. Columbia*, 378 U.S. 347 (1964), this Court applied the same reasoning to invalidate a State law conviction under an expanded interpretation of punishable conduct by the California Supreme Court, as violating the Due Process Clause of the Fourteenth Amendment.¹⁴

The Ex Post Facto Clauses have been stated to apply only to the imposition of punishment [*United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 13 (1977); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798)]. It is submitted that the punishment imposed by punitive damages is sufficient to require the application through the Due Process Clause of the Ex Post Facto Clause principles stated in the *Marks* and *Bouie* cases, above, and *Weaver v. Graham*, 450 U.S. 24, 30-32 (1981) and *Calder v. Bull*, above.

Additionally, the Ex Post Facto Clauses have not been limited in application to criminal prosecutions. In *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138-139 (1810) the Ex Post Facto Clause was applied in a case involving vested property rights; and *Cummings v. Missouri*, 71 U.S. (4 Wall) 277, 327-328 (1867) and *Ex Parte Garland*, 71 U.S. (4 Wall) 333, 377-378 (1867), involved, in effect, license revocation proceedings for failure to take an oath following the Civil War, which was held to be punishment. In *Burgess v. Salmon*, 97 U.S. 381, 385 (1878), a civil suit to collect a duty imposed by law after the sale of the item was completed, this Court stated that "ex post facto effect cannot be evaded by giving civil form to that which is essentially criminal."

¹⁴ See also *Ettor v. Tacoma*, 228 U.S. 148, 155-156 (1913), Fourteenth Amendment Due Process violated by State statute repealing a vested right to compensation; *Coombes v. Getz*, 285 U.S. 434 (1932), Fourteenth Amendment Due Process violated by change in a State constitution repealing liability of defendants during the course of litigation.

The concerns of the Ex Post Facto Clauses apply directly to punitive damages awards. No fair warning is given of the amount of punishment. All determinations of punishment by punitive damages awards are after the fact and adverse to the defendant, except in those cases in which legislatures have previously acted to limit punitive damages awards [see e.g. *Pet. Reply Cert. App. F*].

Unless limits are set on punitive damages awards prior to commission of the punishable acts, arbitrary, selective punishment, at the whim of the particular jury or court, becomes the rule, giving free reign to bias and prejudice.¹⁵

This is contrary to all of the fundamental principles of fairness and notice embodied in the Due Process and Ex Post Facto Clauses.¹⁶

¹⁵ Judges may impose punishment only to the extent the law has authorized prior to commission of the acts for which punishment is to be imposed [*Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); *Dobbett v. Florida*, 432 U.S. 282, 292 (1977); *Miller v. Florida*, 482 U.S. 423, 429, 435-436 (1987)].

Prior to the adoption of penal codes by the states, crimes were those defined by the received common law of England. [Pound, *Criminal Justice In America*, pages 106-121 (1951); Rich, *Law And The Administration Of Justice*, pages 58-59 (1975); Wharton, *Criminal Law*, § 9 (1978); Campbell, *Law Of Sentencing*, §§ 1, 2 (1978)]. The punishment for those crimes was fixed and established by the common law, and judges were required to sentence in accord therewith although greater discretion was allowed for misdemeanors [Tomas, *The Penal Equation*, p. 3 (1978)]. Also, by the Eighteenth Century, England had adopted a penal code [Campbell, *Law Of Sentencing*, § 2 (1978)].

In states permitting jury sentencing, juries must also sentence within prescribed limits [*See Suits v. State*, 507 P.2d 1261 (Okla.Crim. 1973)].

¹⁶ Fair notice is one of the bases of the Ex Post Facto Clauses. See *Miller v. Florida*, 482 U.S. 423 (1987), wherein this Court explained the reasons for inclusion of the Ex Post Facto Clauses in the Constitution as follows, at pages 425-430:

"... [T]he reason the Ex Post Facto Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legis-

(continued)

It is a fundamental tenet of this society that such arbitrary power is not given to any branch of government, or its instrumentalities. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), an ordinance regulating laundries was challenged as violating the Equal Protection rights of Yick Wo, because, among other reasons, the ordinance was administered in a way to apply only to Chinese laundries. This Court held the ordinance to violate the Equal Protection Clause, stating, at pages 369-70:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . ." (Emphasis added.)

It is submitted that application of these principles to the award of punitive damages in this case requires that the award be vacated, with an opinion that no such awards can be made in the absence of prior governmental action establishing the range of permitted punishment for defined, forbidden conduct.

While it is recognized that the United States Constitution does not mandate separation of powers in state governments [see e.g. *Hughes v. Superior Court Of California*, 339 U.S. 460, 467 (1950)], and therefore, state courts could theoretically announce such rules prospectively where state

(ftn. continued)

lation. . . [and] that legislative enactments 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.' . . . Thus, almost from the outset, we have recognized that central to the ex post facto prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.' *Weaver*, 450 U.S., at 30, 67 L.Ed 2d 17, 101 S.Ct. 960."

constitutions permit,¹⁷ it is submitted that the prescription of punishment and the definition of punishable conduct are appropriately legislative functions.¹⁸

At the federal level the determination of the punishment to be imposed for proscribed acts is an exclusive legislative function [*United States v. Hudson And Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); *United States v. Eaton*, 144 U.S. 677, 687-688 (1892); *Gore v. United States*, 357 U.S. 386, 393 (1958); see also *Livingston v. State*, 419 So.2d 270 (Ala. Cr. App. 1982, applying Alabama law)].

In *Gore v. United States*, above, this Court stated, at page 393:

"In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility . . . these are peculiarly questions of legislative policy."

The legislature's duty is satisfied by establishing a range of permissible punishment for the particular offense [*United States v. Batchelder*, 442 U.S. 114, 126 (1979)], prior to the commission of the punishable act by the defendant [*Miller v. Florida*, 482 U.S. 423, 435-436 (1987)].

The absence of legislative or court action in Alabama to perform the balancing and weighing of competing choices to set the range of permitted punishment by way of punitive damages prior to the acts involved, placed purely arbitrary power in the jury and the reviewing courts, to set punishment after the fact.

¹⁷ Clark, *Handbook of Criminal Law*, (1st Ed. 1984) p. 3.

¹⁸ See discussion in Jeffries, *Legality And Vagueness, And The Construction Of Penal Statutes*, 71 Va.L.Rev. 189, 190-195 (1985).

This, it is submitted, violates the fundamental fairness requirement of the Due Process Clause of the Fourteenth Amendment.

The punitive damages award below should therefore be vacated.

II. ALABAMA LAW VIOLATED PACIFIC MUTUAL'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, BY ALLOWING PUNITIVE DAMAGES TO BE AWARDED AGAINST IT UNDER A *RESPONDEAT SUPERIOR* THEORY

A punishment sanction was imposed upon Pacific Mutual for acts of Mr. Ruffin, in pocketing premiums on Union Fidelity medical insurance policies. The jury may have found that Mr. Lupia had knowledge that billings and notices were being sent to Mr. Ruffin care of Mr. Lupia at the Pacific Mutual Agency office. Both were licensed with Union Fidelity. No evidence showed that Mr. Lupia was aware that Mr. Ruffin was collecting premiums contrary to his contract.

No evidence showed that Pacific Mutual's home office received any notice of any alleged similar prior activity by Mr. Ruffin before the actions in this case, or that Pacific Mutual had any notice of the actions complained of in this suit prior to the filing of the complaint.

No evidence showed any authorization for or ratification of this conduct. In fact, Pacific Mutual's contract with Mr. Ruffin forbade him from collecting any premiums other than the initial premium to be submitted with an application.

Pacific Mutual was therefore punished for unauthorized, unratified actions of one, or possibly two of its agents for acts they performed while acting on behalf of another company, Union Fidelity. The collecting of premiums was

forbidden, and stealing them cannot under any circumstances be deemed to be within any authority of an agent.

When punitive damages were imposed on Pacific Mutual on a *respondeat superior* basis, the focus for determination of the amount of the damages shifted from Mr. Ruffin to Pacific Mutual. It is self-evident that the jury would not have imposed a fine of over one million dollars on Mr. Ruffin. This factor contributed greatly to the fundamental unfairness, excessiveness and disproportionality of the fine imposed in this case, even though no wealth evidence was admitted.

A. The Punitive Damages Award Herein Violated Due Process By Imposing Punishment For Conduct Not Authorized Or Ratified, And Not Performed To Benefit The Principal.

In the law which has developed regarding the liability of corporations for criminal acts of agents, the following rules appear:

1. Legislatures have the authority to impose absolute liability on corporations for acts of agents, in public welfare crimes, unrelated to knowledge or any other mental element, where the forbidden act or omission is so injurious to the public interest that no mental element is required [*United States v. Balint*, 258 U.S. 250 (1922); *Morissette v. United States*, 342 U.S. 246 (1952)].

2. Legislatures may, consistently with Due Process, impute the mental element of the agent to the corporation for purposes of criminal liability under regulatory statutes, where the agent is acting to benefit the corporation and further its business [*New York Central And Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909); *See United States v. A & P Trucking Co.*, 358 U.S. 121 (1958); *Standard Oil Of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958)].

No such legislative programs are involved in this case.

Virtually all of the cases upholding corporate criminal liability involve statutes regulating business activity. In ALI Model Penal Code, Comment On § 207, Tentative Draft No. 4 (1956), it is stated, at page 149:

"... [T]he great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy."

Outside of the regulatory area, where fines are imposed to achieve compliance under circumstances where it is in the corporation's financial interest to evade the statutory requirements, there would appear little justification for allowing punishment of corporations for the punishable mental state of agents performing unauthorized, unratified acts within the scope of actual or apparent authority.¹⁹

That punishment falls ultimately upon innocent shareholders, or here, upon Pacific Mutual's other policyholders, who own the company.

However, assuming the viability of such awards, it is submitted that the punitive damages award here violated Due Process by imputing acts of Mr. Ruffin to Pacific Mutual which were not performed to benefit, or with any intent of benefiting, Pacific Mutual, and therefore are beyond the point of fundamental fairness.

As noted above, virtually all of the cases holding corporations to criminal liability for acts of agents outside of the absolute liability, public welfare offense area, have been

¹⁹ Canfield, *Corporate Responsibility For Crime*, 14 Colum.L.Rev. 469 (1914); Francis, *Criminal Responsibility Of Corporations*, 18 Ill.L.Rev. 305 (1924); Mueller, *Mens Rea And The Corporation*, 19 U.Pitts.L.Rev. 21 (1957); Note, *Corporate Criminal Liability For Acts In Violation Of Company Policy*, 50 Geo. L.J. 547 (1962); Perkins, *Criminal Law*, (2d Ed. 1969).

regulatory statutes, where the legislatures have expressed the intent that the mental element of the agents be imputed to the corporation. Courts, in enforcing this legislative intent, have drawn the line for the imposition of such liability at the point where the agent cannot be said to be acting to benefit, or for the purpose of benefiting, the corporation. [See e.g. *New York Central And Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1909); *Standard Oil Of Texas v. United States*, 307 F.2d 120, 128 (5th Cir. 1962); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958).

It is submitted that the line so established is also the line beyond which Due Process does not allow the actions or intent of the agent to be imputed to the corporation for purposes of imposing punishment.

In *New York Central And Hudson River R.R. Co. v. United States*, above, which established the basic principles of corporate criminal liability, this Court emphasized that liability, civil and criminal, is imposed on corporations "because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal." [212 U.S. at 493.]

Where these factors are absent, such liability is not imposed. In *Standard Oil Of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962), employees of Standard Oil violated the Connally "Hot Oil" Act by diverting oil from Standard's wells and falsely recording it as having been produced by eligible wells of a third party. Standard Oil was convicted of "knowingly" falsely recording the production. The Circuit Court, in reversing the conviction, stated at page 128:

"... Thus the taking in or paying out of money by a bank teller, while certainly one of his regular functions, would hardly cast the corporation for criminal liability if in such 'handling' the faithless employee was pocketing the funds as an embezzler or handing them over to a confederate under some ruse."

This example is exactly the basis upon which Pacific Mutual was punished. The Court characterized such liability as follows, at page 129:

"... [T]o say that acts done by servants actuated by such evil and specifically unlawful motives were the acts of the very corporations thus sought to be cheated or implicated in practices known to be in serious violation of law and, moreover, to impute not only accountability but 'knowledge' of such acts to the corporations, would be to disregard every accepted notion of respondeat superior."

The Court then stated, as the governing rule, at page 129:

"[T]he corporation does not acquire that knowledge or possess the requisite 'state of mind essential for responsibility,' through the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer."

It is submitted that the rule stated above is required by Due Process. A defendant cannot be punished for an act or omission so far removed from culpability that punishment cannot be justified [*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982); *Robinson v. California*, 370 U.S. 660, 667 (1962); *Thompson v. City Of Louisville*, 362 U.S. 199 (1960)].

Mr. Ruffin's actions were taken to benefit himself, while dealing with the medical insurance policy issued by another company. The trial court described a fraud justifying the punitive damages award as, "... Ruffin knowingly and intentionally committed fraud by collecting insurance premiums on canceled policies and keeping the premiums for himself." [Pet. Reply Cert. App. A12.] In his deposition testimony, Mr. Ruffin stated that he was collecting the premiums after cancellation of the Union Fidelity policy for submission with applications to other companies. Therefore,

he cannot have been acting for, or with intent to benefit, Pacific Mutual.

Punishment of Pacific Mutual for Mr. Ruffin's apparent theft of the premiums from Pacific Mutual, assuming *arguendo*, that Pacific Mutual could under any circumstances be considered the principal as to such act, violated the concept of fundamental fairness embodied in Due Process.

III. THE AMOUNT OF THE AWARD OF PUNITIVE DAMAGES IN THIS CASE WAS EXCESSIVE, IN VIOLATION OF PACIFIC MUTUAL'S DUE PROCESS RIGHT TO BE FREE OF GROSSLY EXCESSIVE, DISPROPORTIONATE DAMAGES AWARDS

If this Court accepts the analysis set forth in above, regarding the standardless jury discretion to punish in this case, the question of the excessiveness of this award, or future punitive damages awards, would not be involved. The issue would, rather, be the validity, if challenged, of state legislative acts providing for punitive damages.

Here, the actual economic damage sought by all Respondents was \$3,923.94 [Pet. Reply Cert. App. A21-22]. Mrs. Haslip sought a combination of economic and emotional distress damages of \$200,000 [*Id.*, A22-23], and punitive damages of \$3,000,000 [*Id.*, A23]. The punitive damages award as to Mrs. Haslip alone, assuming the jury awarded the full \$200,000 in non-punitive damages, would be \$800,000. Respondents' counsel presented the case to the Alabama Supreme Court as involving a punitive damages award of \$1,040,000 [*Id.*, C1].

A number of decisions of this Court have addressed the issue of whether or not a particular penalty constituted punishment, and the Constitutional implications of such a finding [*Calder v. Bull*, 3 U.S. (3 Dall.) 286 (1798); *United States ex. rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Trop v.*

Dulles, 356 U.S. 86 (1958); *United States v. Ward*, 448 U.S. 242 (1980) and *United States v. Halper*, 490 U.S. ___, 109 S.Ct. 1892, (1989)].

The punishment purpose of the punitive damages award here is express. The jury was instructed that punitive damages were not to be awarded for compensation for injury, but for punishment.

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. ___, 109 S.Ct. 2909 (1989), Justice Brennan, in his concurrence, suggested that Due Process forbids excessive damages in civil cases, stating, at page 2923:

"Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive,' *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable,' *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); see also *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915); *Missouri Pacific Railway Co. v. James*, 115 U.S. 512, 522-23 (1885)."

The concern for proportionality of punishment thus expressed is a common theme under the Constitution [See *Trop v. Dulles*, 356 U.S. 86 (1958); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Plyler v. Doe*, 457 U.S. 202 (1982); and *Solem v. Helm*, 463 U.S. 277 (1983)]. Due Process, Equal Protection and the Eighth Amendment all share this concern.

The general rule regarding whether a punishment sanction is excessive appears to be that the punishment must not be grossly out of proportion to the severity of the offense [*Id.*].

While the three part test for excessiveness and disproportionality set forth in *Solem v. Helm*, above, was applied in an Eighth Amendment excessiveness context, it is submitted that the same analysis is appropriate for consideration of excessiveness under a Due Process analysis. In *Solem*, that test was stated as follows, at pages 290-292:

"First, we look to the gravity of the offense and the harshness of the penalty. . . .

"Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. . . .

"Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."

Applying the *Solem* test here, one can scarcely imagine a criminal statute being upheld which imposed a million dollar fine for vicarious liability of a principal not shown to have had a *mens rea*.

The disproportion between the fine assessed in this case against an innocent corporation for the unauthorized, unratified fraud of a sales agent, and the fines established by the Alabama legislature for serious offenses against the public is so great that such fines are excessive in violation of constitutional protections. [Compare the recent punitive damages awards in Appendix A to the statutory criminal fines in Appendix B. They are shockingly disproportionate.] See Ala. Code §§ 13A-4-3, 13A-5-12 and 13A-9-41 (1975). Comparison of the award in this case with punitive damages established by the Alabama Legislature where it has addressed the issue of the appropriate amount of civil punishment with respect to specific conduct shows a similar disproportionality [see Pet. Reply Cert. App. F].

Similarly, no criminal fine in virtually any state remotely approaches the amount of the fine imposed upon Pacific Mutual here. This penalty award should therefore fail the second *Solem* test.

With respect to the third *Solem* test, it is virtually impossible to make any comparison of the fine imposed in this case with fines imposed by other jurisdictions for the same offense. In the majority of jurisdictions, punitive damages are not allowed against a principal upon a *respondeat superior* basis, where no ratification or authorization is proven and the agent is not in a managerial capacity [Pet. Reply App. D]. Further, the arbitrary and unpredictable nature of punitive damages in general makes comparisons an exercise in futility, other than to show the arbitrary nature of the doctrine. For example, in a products liability case, *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689 (1967), punitive damages for falsifying drug test dates, resulting in blindness, remitted to \$250,000 were upheld, while in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967), a case involving injury from the same drug, against the same manufacturer, the court set aside the punitive damages award entirely.

Under any test of excessiveness, however, it is submitted that the punishment imposed upon Pacific Mutual on an apparent authority basis was excessive. The award in this case exemplifies the concern expressed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) regarding punitive damage awards in wholly unpredictable amounts bearing no necessary relation to actual harm caused.

Even an \$800,000 punishment sanction under the facts of this case must be deemed to be grossly disproportionate to any fault on the part of Pacific Mutual, and therefore, to violate the Due Process Clause of the Fourteenth Amendment.

IV. THE SUIT BELOW, ALTHOUGH NOMINALLY CIVIL, MUST BE CONSIDERED CRIMINAL IN NATURE AS TO THE PUNITIVE DAMAGES AWARDED THEREIN, ENTITLING PACIFIC MUTUAL TO PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As noted above, the punitive damages award here was imposed as punishment, and served the same function as a criminal fine.

In an early analysis of punitive damages awards, Professor Willis wrote:²⁰

"... No hypothesis, however ingenious, can cloud the mind to the fact that exemplary damages put a man in jeopardy once, and if he is also punished criminally for the same offense, he is 'twice put in jeopardy.' Again, when assessed exemplary damages, the accused is really punished for a criminal offense without the safeguards of a criminal trial. . . . The procedure and principles of criminal law are disregarded, the rules of damages are forgotten, and the machinery of justice is used for the avowed purpose of giving the plaintiff that to which he has no shadow of right. . . . The doctrine is altogether inconsistent with sound legal principles and it is unfortunate that it ever found lodgment in the law, and we look with admiration upon any court brave enough to disown and abandon it."

²⁰ Willis, *Measure of Damages When Property Is Wrongfully Taken By An Individual*, 22 Harv.L.Rev. 419, 421-422 (1909).

Professor Willis' comments sum up Pacific Mutual's experience in this case.

The rights of Pacific Mutual under the Fourteenth Amendment to certain trial procedural protections incorporated from the Fifth Amendment were violated by the trial procedures below.

Where punishment is imposed in actions initiated by the government, certain Fifth and Sixth Amendment protections have been required [*United States v. Halper*, 490 U.S. ___, 109 S.Ct. 1892 (1989); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Trop v. Dulles*, 356 U.S. 86 (1958). See also *United States ex rel Marcus v. Hess*, 317 U.S. 537 (1943)].

Here, the enforcement of the State's interest in punishment and deterrence was given over to private attorneys general [*In Re Paris Air Crash*, 622 F.2d 1315 (9th Cir. 1980), *cert. denied*, 449 U.S. 976 (1980)]. The fact that the punishment is imposed in a private action should not affect the rights of the defendant made subject to possible severe punishment [*See A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925); *Giaccio v. Pennsylvania*, 382 U.S. 399, 401-403 (1966); *Burgess v. Salmon*, 97 U.S. 381, 385 (1878); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 326-27 (1867)]. To the defendant facing possible stigma and severe financial penalties, the difference between an action seeking a civil penalty and one seeking a criminal penalty is small.

Further, the sheer magnitude of present punitive damages awards [see e.g. Appendix A, setting forth the astonishing number and size of recent Alabama punitive damages awards, and the similar appendix to the *amicus curiae* brief for the Association for California Tort Reform] requires that rigorous procedural fairness be imposed in these trials.

It is submitted that, as relevant in this case, the procedural protections required are (i) a beyond a reasonable doubt burden of proof, (ii) unanimous jury, (iii) an upper limit on

the punishment, and (iv) trial of issues of underlying liability prior to trial of issues relating to liability for and amount of punitive damages.

Under the test of procedural Due Process set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), it is submitted that each of the above is required. In *Mathews*, this Court set forth the analysis for determining the requirements of procedural Due Process in particular cases, stating, at page 335:

"...[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Testing the trial procedures in this case by the three *Mathews* factors shows that each of the following additional protections were required.

A. Beyond A Reasonable Doubt Standard Of Proof.

The trial court rejected Pacific Mutual's requested jury instruction for a beyond a reasonable doubt burden of proof.

Given the close analogy of punitive damages to criminal fines, it is submitted that this enhanced burden of proof is required by Due Process. [See *In Re Winship*, 397 U.S. 358, 364 (1970)]. Colorado has imposed a beyond a reasonable burden of proof by statute [Colo. Rev. Stat. § 13-25-127(2) (Supp. 1986)].

Other states have by statute or court decision required a clear and convincing evidence test. In *Travelers Indemnity*

Co. v. Armstrong, 442 N.E.2d 349 (Ind. S.Ct. 1982), the Court adopted that standard of proof, stating, at page 363:

"A rule that would permit an award of punitive damages upon inferences permissibly drawn from evidence of no greater persuasive value than that required to uphold a finding of the breach of contract — *which may be nothing more than a refusal to pay the amount demanded and subsequently found to be owing* — injects such risks into refusing and defending against questionable claims as to render them, in essence, nondisputable. The public interest cannot be served by any policy that deters resort to the courts for the determination of bona fide commercial disputes. . . ." (Emphasis added.)

It is submitted that the reasoning of the Indiana Court is sound, but that a clear and convincing standard of proof, while an improvement, is not sufficient in these cases. The risks of erroneous fact finding and jury bias are too high in cases where civil fines can be awarded which far exceed any conceivable criminal fine. Such risk requires the enhanced standard of proof to provide the necessary confidence in the correctness of the fact finding involved. [See *Addington v. Texas*, 441 U.S. 418, 423 (1979)].

B. Unanimous Jury.

Alabama required a unanimous jury in this case.

C. Upper Limit On Awards.

The necessity of such a limit has been discussed above. Under the test in *Mathews v. Eldridge*, above, it is submitted that such a limit is procedurally required. Limits fixed to match conduct would alleviate much of the problem associated with these awards. The fact that Alabama and other states have limited punitive damages in many areas demonstrates that no governmental interest would be adversely affected.

D. Separation In The Order Of Trial Of Liability Issues From Punitive Damages Issues.

Again under the test in *Mathews v. Eldridge*, above, it is submitted that bifurcation is required of the order of trial, to try the issues of underlying liability before issues related to punitive damages and the amount of such an award.

If such bifurcation is not allowed, the defendant is put at risk of erroneous findings of fact on liability issues. Here, the jury below could not help but be influenced in determining whether or not Pacific Mutual should be held for Mr. Ruffin's fraud by evidence and argument relating to plaintiffs' request for emotional distress and punitive damages. This unnecessary risk can easily be avoided by controlling the order of proof and submitting the question of underlying liability to the jury prior to continuing the trial, if necessary, as to punitive damages issues.

V. ALABAMA PUNITIVE DAMAGES LAW IS DISCRIMINATORY IN VIOLATION OF THE EQUAL PROTECTION CLAUSE, BY ENCOURAGING DISPROPORTIONATE PUNISHMENT, WITHOUT RATIONAL BASIS.

The Fifth, Eighth and Fourteenth Amendments, and the Ex Post Facto Clauses, all embody a concern for even-handed application of the law to all. [*Plyler v. Doe*, 457 U.S. 202 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *How Ah Kow v. Nunan*, 12 Fed.Cas. 252 (Case 6, 546, 1877); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867).]

The Equal Protection cases generally deal with classifications which discriminate against groups, protecting against religious, racial, ethnic and gender bias, among others. Classifications which are arbitrary or capricious are

invalid. [*Walters v. St. Louis*, 347 U.S. 231 (1954); *Old Dearborn Distributing Co. v. Seagrams-Distillers Corp.*, 299 U.S. 183 (1936).]

Under Alabama law, and punitive damages law generally, each jury or court is allowed to classify and discriminate in deciding who among those "guilty" of substantially the same conduct should be punished, and how severely to punish those chosen for punishment.

The effects of this unpredictable discretion is to allow juries to punish the unpopular and indulge bias and prejudice [*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 250 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-84 (1971) (Marshall, J., dissenting)] and to inhibit access to the courts for the resolution of disputes [*Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 363 (Ind. S.Ct. 1982)].

An example of this differential punishment in Alabama is discussed above, in Section I.B, wherein Justice Houston noted the great disparity in awards for substantially the same conduct made by two different juries which were identically instructed. It is submitted that the award of punitive damages here, and the Alabama law under which it was made, violated both the Due Process and Equal Protection rights of Pacific Mutual. The award should be vacated.

VI. THE CONSTITUTIONAL DEFECTS IN THE AWARD OF PUNITIVE DAMAGES AGAINST PACIFIC MUTUAL IN THIS CASE WERE NOT CURED BY JUDICIAL REVIEW AND THE POTENTIAL FOR A REMITTITUR

The Alabama Supreme Court stated at page 11 of its opinion [Pet. App. B13] that review of the punitive damages award by the trial court under the procedures established in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986)

further established that the Due Process Clause had not been violated. In fact no such review occurred.

In *Hammond*, the Alabama Supreme Court established seven factors to be considered by the trial court in reviewing a challenged award of punitive damages. They are:

- (i) whether there is a reasonable relationship between the punitive damages and the harm done by the defendant;
- (ii) the reprehensibility of defendant's conduct;
- (iii) the profit to defendant from such conduct;
- (iv) the wealth of the defendant;
- (v) the costs of litigation;
- (vi) whether criminal sanctions have been imposed; and
- (vii) whether other civil awards have been made against defendant for the same conduct.

These factors are largely unreviewable, and merely transfer discretion to the reviewing court. For example, the "reasonable relationship" test has proved to be meaningless because virtually any ratio of punitive to actual damages can be and has been held to be "reasonable." These factors amount to no more than the "gentle test of excessiveness," particularly given the extraordinary deference given to the jury decisions in these cases. At most, use of the language of these criteria merely disguise the true bases of the court's decisions, which are subjective value judgments.

Where, as here, there were no meaningful standards to guide the jury, trial court and appellate review is meaningless. Courts, no more than juries, can be given unbridled discretion to determine the amount of punishment after the defendant has acted. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *Marks v. United States*, 430 U.S. 188, 191-192 (1977); *Bowie v. Columbia*, 378 U.S. 347 (1964); the vice of vague standards is that no meaningful review can be made [*Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984)].

The trial court review in this case illustrates this fact. That court did not conduct a *Hammond* hearing, and the reasons stated by the trial court for upholding the award were not *Hammond* factors. The trial court's reasons were stated as follows [Pet. App. A15]:

"Although the award is for a great amount of money, it is the considered opinion of this Court that it is not excessive as a matter of law, though this Court would in all likelihood have rendered a lesser amount; nor is the verdict based upon bias, passion, corruption, or other improper motive. The jury seems to fashioned [*sic*] their awards in proportion to the damage done each plaintiff; awarding the most damaged plaintiff, Cleopatra Haslip, the larger award and the least damaged plaintiff, Eddie Hargrove, the least award.

"The jury was composed of male and female, white and black and in the opinion of the Court, acted conscientiously throughout the trial."

These stated reasons demonstrate only the subjective reaction of the trial judge, tempered by deference to the jury verdict. The resulting judgment was affirmed by the Alabama Supreme Court, upon a presumption of the correctness of the verdict.

Even if a review utilizing *Hammond* criteria had been given, it would not have cured the defects.

Justice Maddox, in his dissent below [Pet. App. B16] stated his view of these criteria as follows:

"While I applaud the procedure this Court has adopted to review and revise the jury's decision based upon its 'standardless discretion,' I cannot believe that procedure is sufficient to accord to litigants all the due process protection the Constitution envisions." [Footnote omitted.]

It is submitted that judicial review does not and cannot cure the constitutional defects in the punitive damages award in this case. A procedure for review of a decision made under an unconstitutional law does not and cannot cure the unconstitutionality of the law. [*Baggett v. Bullitt*, 377 U.S. 360, 373 (1964); *See Furman v. Georgia*, 408 U.S. 238 (1972); *cf. Greenbelt Coop. Publishing Assn. v. Bresler*, 398 U.S. 6, 7-11 (1970).]

In *Baggett v. Bullitt*, 377 U.S. 360 (1964), this Court stated, at p. 373:

"Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."

These defects are worsened because, in Alabama, as in most states, extraordinary deference is given to the jury's decision as to punitive damages, and a jury's punitive damage award will only be disturbed if it is, in the judgment of the reviewing court, so excessive as to show that it must have been the product of bias, passion, prejudice, corruption or other improper motive. [*Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)]. This deference is enhanced in Alabama because of that state's interpretation of the provision in the Alabama Constitution, confirming a right to jury trial.²¹

This standard of review leaves such a broad field for unfettered jury discretion that it cannot cure underlying defects, and as noted above, merely transfers standardless discretion to the reviewing courts.

²¹ See the concurring opinion of Houston, J., in *Charter Hospital of Mobile, Inc. v. Weinberg*, 1990 Ala. Lexis 17, to be published at 558 So.2d 909 (Jan. 12, 1990), in which the effect of this provision on judicial review of jury verdicts appears to contribute to his view that review under *Hammond* procedures cannot cure the constitutional defects in Alabama punitive damages law.

In *2-D's Logging, Inc. v. Weyerhaeuser Co.*, 632 P.2d 1319 (Or. 1981), the appellate court made note of this problem, stating at page 1326:

"[Punitive damages doctrines have] resulted in a perplexing and contorted mode of judicial review . . . which, in reality, is an imprecise pattern of subjective judicial reactions mixed with some episodes of deference to jury verdicts. . . . At least in cases where there is no specific statutory authorization for their award, the imposition of punitive damages involves a policy or value judgment."

Decisions by reviewing courts in these cases are equally as invalid as the original jury awards, because they are made on a standardless basis.

The *Hammond* factors are equally deficient in content as standards for juries in setting awards as for reviewing courts in overseeing such awards, because (i) these "standards" are insufficient as guides to determine the amount of punishment (only two of the factors are directed to that issue), and (ii) no range of permissible punishment would have been set in advance of Pacific Mutual's conduct, to give fair warning of the consequences of committing whatever wrongful acts were involved. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *Bouie v. Columbia*, 378 U.S. 347 (1964)]. Decisions by either a jury or a court would still be made upon the basis of the subjective reactions of the jurors or judges, with no effective or reviewable limit on their discretion as to the amount of the award. Such decisions are necessarily arbitrary, and therefore invalid. [*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984); *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1886)]. Review of such awards would still necessarily be by the "gentle test of excessiveness."

Discretion unguided by any objective, meaningful standards would still reside in the jury, and be transferred to reviewing courts upon motion or appeal.

Justice Houston has now joined Justices Maddox and Steagall in concluding that Alabama review procedures do not cure the Due Process defects at the jury level. In *Charter Hospital of Mobile v. Weinberg*, 1990 Alabama Lexis 17 (Jan. 12, 1990), Justice Houston²² stated that he had believed that post trial court review would pass constitutional muster, but that because of the deference to jury verdicts required by the Alabama Constitution he had to conclude such review did not cure the defects. Justice Houston stated, at 1990 Ala. Lexis 17, pages 22-23:

"Setting standards for post-trial review of a jury's verdict . . . does not comply with this constitutional provision, since the standard by which the jury is to gauge the amount of punitive damages, if any, that it is to award is incomprehensibly vague and unintelligible."

It is submitted that under the three-part test of procedural Due Process set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the provision for remittitur by reviewing trial and appellate courts does not satisfy the requirements of Due Process for adequate limits on jury discretion.

The concern expressed by this Court, that there is a lack of objective standards limiting the jury's imposition of punishment, and juries are left free to render awards without any necessary relationship to actual harm, cannot be met by the generalized, subjective and highly judgmental factors suggested by the Alabama Supreme Court.

²² Justice Houston recommended in his concurrence that juries be instructed with factors essentially the same as the *Hammond* factors. This would not cure the Constitutional defects for the reasons stated in the text.

CONCLUSION

Punitive damages law, as applied in this case, and as presently applied generally, is overwhelmingly lacking in fundamental fairness. The law gives no fair notice of the consequences of prohibited conduct because of the vague and contentless criteria upon which the award was founded. The jury was sent to deliberate with no meaningful standards to guide it as to the amount of punitive damages awardable. This unbridled discretion leads to arbitrary, discriminatory and unpredictable awards.

The jury was told only to consider the "character and degree of the wrong," and the "necessity of preventing similar wrongs." As recognized by Justice Houston, these criteria are hopelessly vague and incomprehensible as standards for a jury to use in assessing punitive damages.

These instructions left the jury free (i) to give reign to biases and prejudices and to punish selectively; (ii) to allow others "guilty" of equally "reprehensible" conduct to go unpunished; (iii) to punish unpopular and target defendants; and (iv) to render awards with no necessary relationship to actual harm caused.

If the award had been made initially by the trial court utilizing the same criteria contained in the pattern jury instruction, the award would be equally invalid. Therefore, trial court review did not, and could not cure the defects at the jury level. Similarly, appellate review based upon these criteria, or the *Hammond* criteria, amounted to no more than the "gentle test of excessiveness." A determination of excessiveness in these circumstances means only that the visceral reactions of the reviewing justices were that the award either was or was not too large [See *Rummel v. Estelle*, 445 U.S. 263, 275 (1980); *Solem v. Helm*, 463 U.S. 277, 308 (1983), Burger, C.J., dissenting].

Without objective limits on the amount of punitive damages which may be awarded for specified conduct, no fair warning of the consequences of any particular conduct is given, and the result is punishment on an *ad hoc*, after-the-fact basis. Such punishment violates the concerns for fundamental fairness and fair warning embodied in the Due Process Clause of the Fourteenth Amendment.

If the Alabama legislature had enacted a statute making conduct of the class of Pacific Mutual's involvement with Mr. Ruffin subject to civil penalty of \$1,000,000, after Mr. Ruffin's fraud, both Due Process and Ex Post Facto Clauses concerns would invalidate application thereof to Pacific Mutual. But that is what was allowed through the jury and reviewing court procedures in Alabama in this case.

This lack of fundamental fairness was exacerbated by the trial procedure employed, which allowed (i) trial of the punitive damages claim concurrently with the agency issues, thereby tainting the fact finding as to agency; and (ii) the award of punitive damages to be made upon a preponderance of the evidence basis, so that a fine in excess of \$1,000,000 could be imposed on the slightest tipping of the balance in favor of Respondents.

Although Alabama did not allow wealth evidence, the amount of the award was clearly based upon the jury's perception of Pacific Mutual's ability to pay, which has no relationship to deterrence or fault, and is a punishment of status [See *Williams v. Illinois*, 399 U.S. 235 (1970)].

Given Pacific Mutual's tenuous connection to the punishable conduct of Mr. Ruffin for which it was punished on a *respondeat superior* basis, Due Process was also violated by such an award. Even applying the rules for imposing criminal liability on corporations for violations of statutory offenses, Pacific Mutual would not validly be subject to punishment. Such liability depends upon the agent acting to benefit, or with intent to benefit, the corporation. No such intent could conceivably be found in Mr. Ruffin's pocketing

of the premiums on the Union Fidelity policy. Punishing Pacific Mutual under these circumstances was akin to punishing a bank because a teller embezzled funds.

No statute existed in Alabama making Pacific Mutual's conduct punishable, and setting the range of permitted punishment. No received common law supplied these deficiencies. The jury was allowed, in fact instructed, to view the evidence through the prism of its biases, and to impose or withhold punishment in any amount as it chose, limited only by its perception of Pacific Mutual's assets. Due Process requires more.

It is submitted that the award of punitive damages should be vacated.

Dated: June 1, 1990

Respectfully submitted,

Of Counsel:

VICKI W.W. LAI
ADAMS, DUQUE
& HAZELTINE

BRUCE A. BECKMAN

Counsel of Record

ADAMS, DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

OLLIE L. BLAN, JR.
BERT S. NETTLES
SPAIN, GILLON, GROOMS,
BLAN & NETTLES

J. MARK HART
SPAIN, GILLON, GROOMS,
BLAN & NETTLES
2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

Attorneys for Petitioner
Pacific Mutual Life Insurance
Company

APPENDIX A

**PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES
OF \$500,000 OR MORE
FROM JANUARY 1, 1990 TO APRIL 30, 1990
(* indicates wrongful death case)
1990**

1. *Wilburn v. Luxaire, et al.* \$50,000,000*
Mobile County Circuit Court
CV-88-147 *et seq.* (April, 1990)
\$50,000,000 punitive damages, plus
previous settlement of \$11,500,000
for wrongful death of five-member
family resulting from alleged negli-
gence involving heating unit.
2. *Sue Chumney as Administrator* 3,000,000*
of the Estate of Christopher E.
Long, deceased v. Flowers Hospital
Houston County Circuit Court
CV-87-587 (1990)
Wrongful death of child.
Settled post-trial.
3. *Tate v. P.P.G. Industries* 2,500,000*
U.S. District Court for the Southern
District of Alabama (February 19, 1990)
Punitive damages for wantonness in
wrongful death case.
4. *Carter v. Old American* 1,400,000
Insurance Company
Lauderdale County Circuit Court
(April, 1990) \$1,400,000 punitive
damages for bad faith nonpayment of
health insurance claim. See 544 So.2d
917 (Ala. 1989) wherein summary
judgment for the insurer was reversed.

5. *Burden v. Empire Fire & Marine Ins. Co.* \$ 1,400,000
Lauderdale County Circuit Court
CV-88-244 (March 2, 1990)
Alleged bad faith for failing to settle uninsured motorist claim. \$400,000 awarded for compensatory damages and \$1,000,000 for punitive damages. Post-trial motions pending.
6. *American Employers Insurance Company v. Southern Seeding Services, Inc., et al.* 1,150,000
U. S. District Court for the Northern District of Alabama CV 87-G-0294S
Verdict awarding \$400,000 in compensatory damages and \$750,000 in punitive damages on February 22, 1990. Appeal filed 3/27/90.
7. *Braden v. Dorsey Motor Sales, Inc.* 1,000,000
Autauga County Circuit Court (April 3, 1990) \$1,000,000 punitive damages, \$15,600 compensatory damages for alleged fraudulent misrepresentation by car dealer that a used car was "new."
8. *William Thornton v. Yamaha Motor Co., Ltd., et al.* 750,000*
Montgomery County Circuit Court CV-88-1639-TH (April 18, 1990)
Wrongful death.
No appeal pending.

**PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES
OF \$500,000 OR MORE
FROM JANUARY 1, 1989 TO DECEMBER 31, 1989
(* indicates wrongful death case)**

1. *Braswell v. Conagra* \$13,150,000
U.S. District Court for Middle District of Alabama (Southern Division)
88-00741-T-S (November, 1989)
Breach of contract and fraud.
\$4,050,000 in compensatory damages and \$9,100,000 in punitive damages. Appeal pending.
2. *Sigafoose, v. Babson Brothers Co.* 10,000,000
Baldwin County Circuit Court
CV-86-573 (1989)
\$10 million punitive damages for fraud involving \$21,000 compensatory claim.
Settled post-trial.
3. *Robbins v. State Farm Mut. Auto. Ins. Co.* 5,000,000
541 So.2d 477 (Ala. 1989)
Macon County
\$5 million punitive damages for bad faith and fraud involving \$700 disability claim. Remitted to \$500,000. Affirmed by Alabama Supreme Court.
4. *Thornton v. Knollwood Park Hospital* 5,000,000*
Mobile County Circuit Court
CV-85-1275 (1989)
Wrongful death.
Settled on Appeal.

5. *Turner v. Alabama Power Company* \$ 4,000,000*
Montgomery County Circuit Court
CV-88-1700-PH (August 30, 1989)
Wrongful death suit.
Appeal pending.
6. *United Serv. Auto Ass'n. v. Wade* 3,500,000
544 So.2d 906 (Ala. 1989)
Walker County
\$3.5 million nonjury punitive damages
verdict for bad faith remitted to \$2.5
million. Compensatory damages of
\$166,795 plus \$21,962 on contract count.
Appeal pending.
7. *Ford v. Colonial Mortgage Co.* 3,000,000
Russell County Circuit Court
CV-89-010 (November 1989)
Punitive damages for fraudulent breach
of residential home loan commitment.
Appeal pending.
8. *Lindblom v. Intercontinental* 3,000,000
Life Ins. Co.
Jefferson County Circuit Court
CV-86-7156 (1989)
Bad faith & fraud involving \$10,000
death benefit.
Appeal pending.
9. *Olympia Spa v. Johnson* 3,000,000*
547 So.2d 80 (Ala. 1989)
Mobile County
Wrongful death.
Affirmed by Alabama Supreme Court.

10. *Land & Associates, Inc. v. Simmons* \$ 2,500,000
[Ms.87-1313, December 22, 1989]
____ So.2d ____ (1989)
Mobile County
Fraud involving \$10,000 in life
insurance proceeds.
Affirmed by Alabama Supreme Court.
11. *Majid Jahandarfard, et al. v. Lomax* 2,500,000*
Killough, et al.
Madison County Circuit Court
CV88-1269P (November 8, 1989)
Wrongful Death.
Appeal pending.
12. *Pettus, Estate of v. Vari-Care* 2,500,000*
Mobile County Circuit Court
CV-86-196 (June 20, 1989)
Wrongful death.
Appeal pending.
13. *Blackburn, et al. v. Altus Bank* 2,038,753
Mobile County Circuit Court
CV-88-2263 (November 30, 1989)
Alleged fraud. Two plaintiffs.
\$1,538,753 for one plaintiff, \$500,000
for other plaintiff.
Appeal pending.
14. *White, et al. v. Georgia Casualty* 2,000,000
Insurance Co.
Barbour County Circuit Court,
Clayton Division
CV-84-037 (June 28, 1989)
Bad faith action.
Appeal pending.

15. *Stoval, Estate of v. Montgomery Health Care, et al.* \$ 2,000,000*
Montgomery County Circuit Court
CV87-173-TH (1989)
Wrongful death.

16. *HealthAmerica, et al. v. Menton* 1,800,000
551 So.2d 235 (Ala. 1989)
Mobile County
Fraud involving \$2,400 claim
for medical benefits.
Affirmed by Alabama Supreme Court;
Cert. denied by Supreme Court of
United States.

17. *Phillips v. United American Ins. Co.* 1,800,000
Etowah County Circuit Court
CV-87-132JSS (June 2, 1989)
Bad faith and fraud involving \$264
unpaid balance on medical claim.
Settled post-trial.

18. *Turner v. Deutz-Allis Credit Corporation* 1,609,500
Barbour County, Clayton Division
CV-85-043 (October 9, 1989)
No post-trial relief. Appeal pending.

19. *Beyer v. Beech Aircraft Corp.* 1,500,000*
Jefferson County Circuit Court
CV-81-2120 (1989)
Wrongful death.

20. *Terry v. John Carner and Leisure American, Inc.* \$ 1,500,000
Jefferson County Circuit Court
CV 85-6777 (November 1, 1989)
Fraud claim involving \$5,500
actual damages.
Settled prior to appeal.

21. *Porter v. Hook* 1,300,000
554 So.2d 382 (Ala. 1989)
Jackson County
Action for breach of written contracts.
Breach of unwritten joint venture
agreement and fraud against cable
television owner.
Remitted to \$300,000 by trial court.
Full verdict reinstated by Supreme
Court of Alabama.

22. *Central Alabama Electric Coop. v. Tapley* 1,000,000*
546 So.2d 371 (Ala. 1989)
Tallapoosa County
Wrongful death.
Affirmed by Alabama Supreme Court.

23. *Pacific Mutual Life Ins. Co. v. Haslip* 1,000,000
[Ms.87-842, Sept. 13, 1989]
553 So.2d 537 (Ala. 1989)
Fraud. Affirmed by Alabama
Supreme Court.
Cert. granted by Supreme Court
of United States.

24. *Carlis v. Ft. Deposit Motor Co., et al.* \$ 1,000,000
Macon County Circuit Court
CV-87-30 (April 19, 1989)
Fraud involving sale of credit life
insurance; approximately \$1,000
compensatory damages.
\$1,000,000 remitted to \$250,000.
Appeal pending.
25. *Shelby County v. Bailey* 1,000,000*
545 So.2d 743 (Ala. 1989)
Jefferson County
Wrongful death - \$500,000 each
for two deaths.
Affirmed by Alabama Supreme Court.
26. *United American Ins. Co. v. Brumley* 1,000,000
542 So.2d 1231 (Ala. 1989)
Marion County
Bad faith involving compensatory
damages of \$5,000.
Affirmed by Alabama Supreme Court.
Rehearing denied.
27. *Kumar v. Lewis* 875,000*
Tuscaloosa County Circuit Court
CV-86-97 (January 27, 1989)
Medical malpractice involving death of a child.
Affirmed by Alabama Supreme Court on 4/06/90.

28. *Battles' Entertainment, Inc.
v. First Federal Savings &
Loan Association of Russell
County, et al.* \$ 800,000
Lee County Circuit Court
CV-88-083 (April 20, 1989)
Fraud in connection with a sale
of real estate.
Settled post-trial.
29. *Robert McDonald v. Continental
Casualty Company (CNA)* 750,000
Houston County Circuit Court
(March 9, 1989)
Alleged tort of outrage due to
late payment of workmen's com-
pensation benefits.
Motions for J.N.O.V. and/or remittitur
denied by trial court.
Appeal pending.
30. *Thomas v. Principal Mut. Ins. Co.* 750,000
Mobile County Circuit Court
CV-85-1275 (1989)
Bad faith failure to pay \$1,000
death benefit.
Set aside by trial court on defendant's
motion for J.N.O.V. - Appeal pending.
31. *Harris v. M & S Toyota, Inc.* \$ 500,000
Jefferson County Circuit Court
CV-86-1344 (August 22, 1989)
Alleged fraud involving sale of used car.
Verdict set aside on J.N.O.V.
Appeal pending.

- | | | |
|-----|---|----------|
| 32. | <p><i>Mallory v. Hobbs Trailers</i>
 554 So.2d 966
 (Ala. September 29, 1989)
 Jefferson County
 Wrongful death. Trial court granted
 defendant's motion for J.N.O.V.
 Original verdict reinstated by
 Supreme Court of Alabama.
 Rehearing denied.</p> | 500,000* |
| 33. | <p><i>Vintage Enterprises v. Jaye</i>
 547 So.2d 1169 (Ala. 1989)
 Tallapoosa County
 \$500,000 punitive damages
 and \$20,000 compensatory,
 relating to sale, order, delivery
 of mobile home, fraud, wantonness,
 negligence, warranty and Magnuson-
 Moss theories.
 Affirmed by Alabama Supreme Court.</p> | 500,000 |
| 34. | <p><i>Watson, Watson & Rutland v.
 Rosser Fabrap Int'l</i>
 U. S. District Court for Middle
 District of Alabama 88-H-1292-N
 (M.D. Ala. 1989)
 Intentional interference with
 business relationship.
 Post-trial motion pending.</p> | 500,000 |

**PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES
OF \$500,000 OR MORE
FROM JANUARY 1, 1988 TO DECEMBER 31, 1988
(* indicates wrongful death case)
1988**

- | | | |
|----|---|-------------------------|
| 1. | <p><i>Turner v. Southern Life &
 Health Ins. Co.</i>
 Macon County Circuit Court
 CV-87-91 (1988)
 Punitive damages for bad faith
 and fraud involving \$1,000 death benefit.
 Remitted to \$500,000.
 Appeal pending.</p> | \$ 5,000,000 |
| 2. | <p><i>Industrial Chemical &
 Fiberglass v. Chandler</i>
 547 So.2d 812 (Ala. 1988)
 Jefferson County
 \$3,750,000 punitive damages -
 \$2.5 million for wrongful death
 and \$1.25 million for breach of
 warranty.
 Affirmed by Alabama Supreme Court.</p> | 2,500,000*
1,250,000 |
| 3. | <p><i>Industrial Chemical &
 Fiberglass v. Ensley</i>
 547 So.2d 812 (Ala. 1988)
 Jefferson County
 \$3.75 million - \$2.5 million for
 wrongful death and \$1.25 million
 for breach of warranty.
 Affirmed by Alabama Supreme Court.</p> | 2,500,000*
1,250,000 |

-A 12-

4. *Heathcoat v. Mitchell Potts, et al.* \$ 3,000,000*
U. S. District Court for the Northern
District of Alabama
Case No. 85-7805, 85-7288 (1988)
Wrongful death.

5. *Clardy v. Sanders* 2,750,000*
551 So.2d 1057 (Ala. 1989)
Montgomery County (January 15, 1988)
Wrongful death.
Affirmed by Alabama Supreme Court.

6. *Proctor & Gamble Co.* 2,750,000*
v. Staples
551 So.2d 949 (Ala. 1989)
Colbert County (March 2, 1988)
Wrongful death.
Reversed on appeal.
Settled thereafter.

7. *E & S Facilities, Inc., et al. v.* 1,750,000
Precision Chipper Corporation, et al.
Jefferson County Circuit Court
CV-84-6422 (April 4, 1988)
Alleged fraud in the procurement of
products liability insurance. Verdict for
\$875,000 each against insurance agency
and insurance broker/wholesaler.
Affirmed by Alabama Supreme Court
on 4/12/90.

8. *Walls v. Colonial Mortgage Co.* 1,700,000
Russell County Circuit Court
CV87-194 (1988)
Fraud involving breach of residential
home loan commitment; compensatory
damages of \$2,500 or less.
Settled pending appeal.

-A 13-

9. *Trawick v. Michaels of* \$ 1,000,000
Oregon Co.
U.S. District Court for Middle
District of Alabama 88-C-413N
(December 21, 1988)
Products liability involving rifle swivel.
Appeal pending on certified question
to Alabama Supreme Court.

10. *Williams v. Rust International* 1,000,000*
Jefferson County Circuit Court
CV-82-174 (1988)
Wrongful death.

11. *Achord v. Momar, Incorporated* 863,625
United States District Court for the
Middle District of Alabama,
Northern Division No.87-D-0824-N
(September 6, 1988)
Products liability suit.
Verdict includes \$500,000 punitive damages.
No appeal.

12. *Carner, et al. v. Commercial* 811,804
Union Insurance Company, et al.
Jefferson County Circuit Court
CV-82-3504 (1988)
Breach of contract and bad faith.

13. *Ramsey Health Care, Inc.* 800,000
v. Follmer
24 ABR 1321
Jefferson County Circuit Court
CV-87-7215
Alleged fraud.
Affirmed by Alabama Supreme Court.

- | | | |
|-----|--|-------------|
| 14. | <i>Alabama Power Co. v. Courtney</i>
539 So.2d 170 (Ala. 1988)
Chilton County
Wrongful death.
Affirmed by Alabama Supreme Court. | \$ 750,000* |
| 15. | <i>Consolidated Freightways
v. Pacheco-Rivera</i>
524 So.2d 346 (Ala. 1988)
Jefferson County
Wrongful death. | 525,000* |
| 16. | <i>Alabama Farm Bureau v. Hixon</i>
533 So.2d 518 (Ala. 1988)
Montgomery County
Wrongful death.
Reversed on appeal. | 500,000* |
| 17. | <i>Alabama Power Co. v. Capps</i>
519 So.2d 1328 (Ala. 1988)
Butler County
Wrongful death.
Affirmed by Alabama Supreme Court. | 500,000* |
| 18. | <i>L. W. Johnson & Assoc.
v. Rivers Constr. Co.</i>
532 So.2d 618 (Ala. 1988)
Marion County
Fraud action by construction
county against developer involving
\$165,000 compensatory damages.
Affirmed by Alabama Supreme Court. | 500,000 |

**PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES
OF \$500,000 OR MORE
FROM JANUARY 1, 1987 TO DECEMBER 31, 1987
(* indicates wrongful death case)**

- | | | |
|----|--|------------------------|
| 1. | <i>Dale, Estate of v. Griffin,
Dept. of Mental Health</i>
Montgomery County Circuit Court
CV85-138-K (1987)
Wrongful death. | \$11,701,372* |
| 2. | <i>Estate of Jackson v.
Phillips Petroleum Co.</i>
676 F.Supp. 1142 (S.D. Ala. 1987)
Reduced punitive damages from
\$5,041,694.04 to \$300,000 in one case,
and from \$2,519,439.85 to \$150,000
in another.
Claim for conversion, intentional
interference with contractual relations
and wrongful exercise of lien rights.
New trial granted on refusal to remit
punitive damages. | 5,100,000
2,550,000 |
| 3. | <i>Super Valu Stores, Inc. v. Peterson</i>
506 So.2d 317 (Ala. 1987)
Etowah County
Breach of contract and fraud in
employment relationship.
Affirmed by Alabama Supreme Court. | 5,000,000 |

4. *Aetna Life Ins. Co. v. Lavoie* \$ 3,500,000
505 So.2d 1050 (Ala. 1987)
Mobile County
\$3 million punitive damages for
bad faith refusal to pay \$1,650
medical claim.
Initially affirmed by Alabama Supreme
Court, then vacated on appeal to
U.S. Supreme Court and thereafter
remitted to \$500,000 by Alabama
Supreme Court and affirmed.
5. *State Farm Mutual Automobile* 1,500,000
Insurance Company v. Hollis, Adm.
ABR 87-808
Coffee County Circuit Court
CV-853 (1987)
Bad faith claim alleging negligent or
wanton failure to settle lawsuit and
wanton failure to file supersedeas bond.
Reversed and remanded for new trial.
6. *Talmage v. Humana Hospital* 1,500,000*
Florence, et al.
Lauderdale County Circuit Court
CV-85-135 (September 10, 1987)
Wrongful death.
Settled post-trial.
7. *Curry, Estate of v. Alabama* 1,250,000*
Gas, et al.
Montgomery County Circuit Court
CV86-323-G (1987)
Wrongful death.

8. *North Carolina Mut. Life. Ins. Co.* \$ 1,000,000
v. Holley
533 So.2d 497 (Ala. 1987)
Tallapoosa County
Bad faith.
Remitted to \$500,000 by Alabama
Supreme Court.
9. *Best Plant Food Products, Inc.* 972,000
v. Cagle
510 So.2d 229 (Ala. 1987)
Jackson County
Breach of warranty/fraud/deceit
Affirmed by Alabama Supreme Court.
10. *Hixon v. Village West Traile Park* 750,000*
Montgomery County Circuit Court
CV-84-1447-PR (February 4, 1987)
Wrongful death.
Reversed and rendered on appeal.
11. *Harmon v. Motors Ins. Corp.* 500,000
493 So.2d 1370 after remand
525 So.2d 411 (1987) Calhoun County
\$500,000 punitive damages for fraud
remitted to \$40,000.
Affirmed conditionally.

**PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES
OF \$500,000 OR MORE
FROM JANUARY 1, 1986 TO DECEMBER 31, 1986
(* indicates wrongful death case)
1986**

1. *Davison v. Mobile Infirmary* \$ 8,000,000
518 So.2d 675 (Ala. 1986)
Mobile County
\$8 million punitive damages for medical
malpractice remitted to \$1,350,000.
2. *Beck, Murray, Tull v. Piper* 5,175,000*
Aircraft, et al.
Jefferson County Circuit Court
CV-83-6266 (1986)
Wrongful death.
3. *Black Belt Wood Yard v. Sessions* 3,500,000*
514 So.2d 1249 (Ala. 1986)
Jefferson County
Wrongful death.
Affirmed by Alabama Supreme Court.
4. *Patricia L. Crandall, et al.* 3,035,000*
v. Rudolph V. Williams
514 So.2d 1267 (Ala. 1987)
Madison County Circuit Court
CV-85-461, CV-85-379
consolidated (January 13, 1986)
One death - \$500,000; one personal
injury - \$2,500,000 (compensatory and
punitive - general verdict); two personal
injuries - \$2,500 each (compensatory
and punitive - general verdict); one
subrogation - \$30,000.
Affirmed.

5. *Treadwell Ford, Inc. v. Campbell* \$ 1,000,000*
485 So.2d 312 (Ala. 1986) 350,000
Mobile County
Three plaintiffs - \$1,000,000
wrongful death; \$60,000 negligence;
and \$350,000 which included compen-
satory damages and punitive damages
for fraud involving a defect in the acceler-
ator of a pickup truck.
Affirmed by Alabama Supreme Court.
Appeal dismissed by 486 U.S. 1028,
108 S.Ct. 2007, 100 L.Ed.2d 596
(U.S.Al., May 31, 1988).
6. *Alabama Power Co. v. Cantrell* 1,000,000*
507 So.2d 1295 (Ala. 1986)
St. Clair County
Wrongful death.
Affirmed by Alabama Supreme Court.
Appeal dismissed by 486 U.S. 1028,
108 S.Ct. 2008, 100 L.Ed.2d 596
(U.S.Al., May 31, 1988).
7. *AmSouth Bank v. Speigner* 1,000,000
505 So.2d 1030 (Ala. 1986)
Elmore County
Wrongful completion, cashing
of \$25,000 check.
Settled on appeal.

8. *Rollison Logging Company of Alabama, Inc. v. John Ellis, et al.* \$ 1,000,000
Cherokee County Circuit Court
CV-84-03 (May 12, 1986)
Alleged fraud involving proposed purchase of logging equipment.
Compensatory damages in the amount of \$78,416 and punitive damages in the amount of \$921,584.
Remitted to \$200,000.

**PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES
OF \$500,000 OR MORE
FROM JANUARY 1, 1985 TO DECEMBER 31, 1985
(* indicates wrongful death cases)**

1. *Holt v. State Farm Mutual Auto Ins. Co.* \$25,000,000
Clay County Circuit Court
CV-82-060 (1985)
Fraud involving UM stacking;
\$10,000 contract claim.
Settled post-trial.
2. *McMillian v. Massey Ferguson, Inc., et al.* 10,500,000
Mobile County Circuit Court
CV-82-686 (1985)
\$10.5 million general verdict which included \$584,000 actual damages for partial leg amputation caused by alleged wantonness in design & manufacture of grain auger.
Settled pending appeal.
3. *General Motors Corp. v. Edwards* 4,000,000*
482 So.2d 1176 (Ala. 1985)
Jefferson County
Two plaintiffs at \$2 million each.
Remitted by trial court to \$1.4 million each.
Affirmed by Alabama Supreme Court.
Overruled by *Schwartz v. Volvo North American Corp.*,
554 So.2d 927, 58 U.S.L.W. 2132
(Ala. July 28, 1989).

- | | | |
|----|--|---------------|
| 4. | <i>May v. Lloyd Noland Foundation</i>
Jefferson County Circuit Court
CV-79-583 (1985)
Wrongful death.
Settled Post-trial. | \$ 4,000,000* |
| 5. | <i>Wright v. Superior Gas</i>
Macon County Circuit Court
CV-84-47 (1985)
Wrongful death.
Settled post-trial. | 3,600,000 |
| 6. | <i>American Pioneer Life Ins. Co.</i>
<i>v. Sandlin</i>
470 So.2d 657 (Ala. 1985)
Marion County
\$3 million punitive damages for
fraud involving \$100,000
compensatory damages.
Affirmed by Alabama Supreme Court. | 3,000,000 |
| 7. | <i>Pasquale Food Co. v. Shakey's Inc.</i>
Jefferson County Circuit Court
CV-82-2606 (1985)
Punitive damages for intentional
interference with business relation-
ship and improper acquisition of
trade secrets. | 3,000,000 |
| 8. | <i>Hudson v. K&S Industries, Inc.</i>
Montgomery County Circuit Court
CV-84-593 (1985)
Wrongful death. | 2,000,000* |

- | | | |
|-----|---|--------------|
| 9. | <i>Nationwide Mut. Ins. Co. v. Clay</i>
469 So.2d 533 (Ala. 1985)
Mobile County
Bad faith involving \$40,000 disabil-
ity claim.
Affirmed by Alabama Supreme Court. | \$ 1,250,000 |
| 10. | <i>Kathy Dunaway, as Mother and</i>
<i>Custodial Parent of Daniel Allen</i>
<i>Dunaway, a Minor, v. Alabama</i>
<i>Power Company</i>
Montgomery County Circuit Court
CV-84-650-PR (December 13, 1985)
Wrongful death.
Appealed. JNOV for Defendant on 4/02/87.
(Reversed) | 500,000* |

APPENDIX B

**VARIOUS ALABAMA STATUTORY OFFENSES AND
CORRESPONDING MAXIMUM FINES**

Alabama Code Section	Offense	Maximum Fine
Sales of Checks § 8-7-15	Failure to obtain a license	\$ 500
Deceptive Trade Practices § 80-19-11(b)	Engaging in unconscionable false, misleading or deceptive acts or practices in the conduct of trade or commerce	\$ 2,000
Deceptive Trade Practices § 8-19-11(a)	Violation of injunction which enjoins deceptive trade practices	\$25,000
Banking and Financial Institutions § 5-19-30	Charging of interest in excess of maximum legal rate	\$ 500
Criminal Code §13A-5-11	Class A Felonies Class B Felonies Class C Felonies	\$20,000 \$10,000 \$ 5,000

Alabama Code Section	Offense	Maximum Fine
Criminal Code § 13A-5-12	Class A Misdemeanors Class B Misdemeanors Class C Misdemeanors	\$ 2,000 \$ 1,000 \$ 500
Health, Mental Health, Environmental Control § 22-1-11	Making false statement of material fact on application for payments from medical agencies; kickbacks, bribes	\$10,000
Health, Mental Health, Environmental Control § 22-22-14(a)	Violation of any provision of the chapter	\$25,000/day
Health, Mental Health, Environmental Control § 22-22-14(b)	Knowingly filing false statements or making false representations regarding the chapter	\$10,000
Toxic Substances in Workplace § 22-33-13	Failure to comply with the provisions of the chapter	\$ 1,000

B 2.

Alabama Code Section	Offense	Maximum Fine
Insurance § 27-10-37(a)	Aiding a nonadmitted insurer in willful violation of the surplus lines law	\$ 1,000
Insurance § 27-10-37(c)	Willful violation of any provision in article	\$ 1,000
Offenses involving Damage, etc., to Property	Criminal Possession of explosives	\$ 5,000
Commercial law and consumer protection	Entering combination, pool etc., to fix price or limit quantity in restraint of trade	\$ 2,000
Industrial Relations and Labor § 25-8-30	Permitting child to be employed contrary to law	\$ 500
Industrial Relations and Labor § 25-2-25	Violation of the Chapter's provisions or lawful rule or regulation of the Board of Appeals	\$ 100

B 3.

Alabama Code Section	Offense	Maximum Fine
Parental Consent to Performing Abortion § 26-21	Violation of provisions of Chapter	\$ 2,000

**ALABAMA STATUTES LIMITING
THE AMOUNT OF PUNITIVE
DAMAGES RECOVERABLE**

1. Code of Alabama 5-19-19 [Charge of Interest in excess of maximum, except bona fide error or accident, double damages or ten times the excess charge].
2. Code of Alabama 6-6-314 [unlawful detainer, double damages].
3. Code of Alabama 8-19-10(a)(2) [using deceptive trade practices in dealings with consumers, treble damages].
4. Code of Alabama 8-19-5(19) and (20) [using deceptive trade practices in dealings with nonconsumers, treble damages].
5. Code of Alabama 37-2-18 [liability for excessive rates charged by common carriers, treble damages].
6. Alabama Rules of Appellate Procedure, Rule 38 [frivolous appeals in civil cases, double costs].

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. THE DUE PROCESS CLAUSE DOES NOT PROHIBIT VICARIOUS LIABILITY FOR PUNITIVE DAMAGES RESULTING FROM THE FRAUDULENT CONDUCT OF AN AGENT ACTING WITH APPARENT AUTHORITY AND WITHIN THE SCOPE OF HIS EMPLOYMENT	10
A. The Record Forecloses Any Claim That Ruffin Was Not Acting As Pacific Mutual's Agent When He Committed The Frauds At Issue	10
B. Alabama's Rule Of Corporate Vicarious Liability Fully Comports With Due Process.....	11
II. THE PUNITIVE DAMAGE AWARD WAS THE PRODUCT OF FAIR, RATIONAL AND RELIABLE PROCEDURES THAT SATISFY ALL REQUIREMENTS OF DUE PROCESS....	17
A. Traditional Common Law Standards And Procedures For Assessing Punitive Damages Are Fully Consistent With The Due Process Clause	19
B. Alabama's Common Law Method For Assessing Punitive Damages Substantially Guides The Discretion Of The Jury, And Subjects The Jury's Assessment To Meaningful Review To Ensure Reasonable Punitive Awards	25
1. The Jury Instruction	25
2. Post-Verdict Review In The Trial Court..	28

TABLE OF CONTENTS—Continued

	Page
3. Review By The Alabama Supreme Court..	30
4. Pacific Mutual Was Not Denied Due Process	36
C. Pacific Mutual's Vagueness Challenge Ignores The Crucial Constitutional Distinction Between Rules Governing Conduct And Standards For Deciding What Consequences Should Flow From Violations Of Those Rules	38
III. THE SIZE OF THIS AWARD DOES NOT VIOLATE ANY SUBSTANTIVE REQUIREMENT OF DUE PROCESS BECAUSE IT IS RATIONALLY RELATED TO ALABAMA'S GOALS OF DETERRENCE AND RETRIBUTION, AND THUS CANNOT BE FOUND "WHOLLY ARBITRARY AND UNREASONABLE"	42
IV. PETITIONER'S OTHER ARGUMENTS LACK MERIT	46
A. Due Process Does Not Require The Full Panoply of Protections Available To Criminal Defendants In A Civil Punitive Damages Proceeding	46
B. Pacific Mutual's Equal Protection Claim Has No Merit	49
CONCLUSION	50

TABLE OF AUTHORITIES

CASES:	Page
<i>Adkins v. Children's Hospital</i> , 261 U.S. 525 (1923)	15
<i>Aetna Life Ins. Co. v. Lavoie</i> , 505 So. 2d 1050 (Ala. 1987)	31, 35
<i>Ah You Man v. Raymark Indus.</i> , 728 F. Supp. 1461 (D. Hawaii 1989)	22, 26, 47
<i>American Pioneer Life Ins. Co. v. Sandlin</i> , 470 So. 2d 657 (Ala. 1985)	43
<i>American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.</i> , 456 U.S. 556 (1982)	8, 13, 14
<i>Auburn Ford, Lincoln Mercury, Inc. v. Norred</i> , 541 So. 2d 1077 (Ala. 1989)	36
<i>Bankers Life and Cas. Co. v. Crenshaw</i> , 108 S.Ct. 1645 (1988)	31
<i>Bankers Life and Casualty Co. v. Crenshaw</i> , 483 So. 2d 254 (Miss. 1985)	31
<i>Barry v. Edmunds</i> , 116 U.S. 550 (1886)	20
<i>British General Insurance Co. v. Simpson Sales Co.</i> , 93 So. 2d 763 (Ala. 1957)	16
<i>Brotherton v. Celotex Corp.</i> , 202 N.J. Super. 148, 493 A.2d 1337 (1985)	47
<i>Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989)	passim
<i>Burnham v. Superior Court of California</i> , 110 S. Ct. 2105 (1990)	18, 21, 23, 35
<i>Cardinale v. Louisiana</i> , 394 U.S. 437 (1969)	48
<i>Central Alabama Electric Co-op v. Tapley</i> , 546 So. 2d 371 (Ala. 1989)	31, 33, 48
<i>Chuy v. Philadelphia Eagles</i> , 595 F.2d 1265 (3rd Cir. 1979)	16
<i>Cincinnati Ins. Co. v. City of Talladega</i> , 342 So. 2d 331 (Ala. 1977)	17
<i>Clemons v. Mississippi</i> , 110 S. Ct. 1441 (1990)	34
<i>Cleveland Board of Education v. Loudermill</i> , 470 U.S. 532 (1985)	18
<i>Coates v. City of Cincinnati</i> , 402 U.S. 611 (1971) ..	39
<i>Consolidated Freightways, Inc. v. Pacheco-Rivera</i> , 524 So. 2d 346 (Ala. 1988)	35
<i>Coryell v. Colbaugh</i> , 1 N.J.L. 77 (1791)	19

TABLE OF AUTHORITIES—Continued

	Page
<i>Cupp v. Naughton</i> , 414 U.S. 141 (1973)	29
<i>Davison v. Mobile Infirmary</i> , 518 So. 2d 675 (Ala. 1987)	35
<i>Day v. Woodworth</i> , 54 U.S. (13 How.) 363 (1851)	20
<i>DeShaney v. Winnebago County Dep't of Social Services</i> , 109 S. Ct. 998 (1989)	17
<i>Donnelly v. DiChristoforo</i> , 416 U.S. 637 (1974)	29
<i>Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.</i> , 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987)	47
<i>Eichenseer v. Reserve Life Ins. Co.</i> , 881 F.2d 1355 (5th Cir. 1989)	23
<i>FDIC v. W.R. Grace & Co.</i> , 691 F. Supp. 87 (1988), <i>aff'd in relevant part</i> , 877 F.2d 614 (7th Cir. 1989), <i>cert. denied</i> , 110 S. Ct. 1524 (1990)	22
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	28
<i>Germanio v. Goodyear Tire & Rubber Co.</i> , 732 F. Supp. 1297 (D.N.J. 1990)	26, 46
<i>Giaccio v. Pennsylvania</i> , 382 U.S. 399 (1966)	40
<i>Gibson v. Gibson</i> , 15 Cal. App. 3d 943, 93 Cal. Rptr. 617 (1971)	47
<i>Goddard v. Grand Trunk Ry. of Canada</i> , 57 Me. 202 (1869)	16
<i>Gogol v. Johns-Manville Sales Corp.</i> , 595 F. Supp. 971 (D.N.J. 1984)	47
<i>Graver Tank and Mfg. Co. v. Linde Air Products Co.</i> , 336 U.S. 271 (1949)	10
<i>Green Oil Co. v. Hornsby</i> , 539 So. 2d 218 (Ala. 1989)	32, 33
<i>Greenholtz v. Nebraska Penal Inmates</i> , 442 U.S. 1 (1979)	27
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	28
<i>Grimshaw v. Ford Motor Co.</i> , 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)	47
<i>Guy v. Commonwealth Life Ins. Co.</i> , 698 F. Supp. 1305 (N.D. Miss. 1988), <i>aff'd in relevant part</i> , 894 F.2d 1407 (5th Cir. 1990)	23

TABLE OF AUTHORITIES—Continued

	Page
<i>Hairston v. Atlantic Greyhound Corp.</i> , 220 N.C. 642, 18 S.E.2d 166 (1942)	16
<i>Hammond v. City of Gadsden</i> , 493 So. 2d 1374 (Ala. 1986)	<i>passim</i>
<i>Hansen v. Johns-Manville Products Corp.</i> , 734 F.2d 1036 (5th Cir. 1984), <i>cert. denied</i> , 470 U.S. 1051 (1985)	47
<i>Harmon v. Motors Ins. Co.</i> , 525 So. 2d 411 (Ala. 1987)	35
<i>Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982)	39
<i>Hopper v. Hutto</i> , 160 S.C. 404, 158 S.E. 726 (1931)	16
<i>Horowitz v. Schneider National, Inc.</i> , 708 F. Supp. 1573 (D. Wyo. 1989)	23
<i>In re Air Crash Disaster at Sioux City, Iowa</i> , 734 F. Supp. 1425 (N.D. Ill. 1990)	22
<i>Jackman v. Rosenbaum Co.</i> , 260 U.S. 22 (1922)	21
<i>Kiser v. Neumann Co. Contractors, Inc.</i> , 426 S.W.2d 935 (Ky. 1967)	16
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)	39, 40
<i>Kurn v. Radencic</i> , 193 Okla. 126, 141 P.2d 580 (1943)	16
<i>Land & Associates, Inc. v. Simmons</i> , 1989 Ala. Lexis No. 1048 (Ala. 1989)	31
<i>Leonen v. Johns-Manville Corp.</i> , 717 F. Supp. 272 (D.N.J. 1989)	23
<i>Lewis v. City of New Orleans</i> , 415 U.S. 130 (1974)	40
<i>Lewis v. Jeffers</i> , 1990 U.S. Lexis No. 3463 (1990) ..	38
<i>Lochner v. New York</i> , 198 U.S. 45 (1905)	15
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	41
<i>Louis Pizitz Dry Goods Co. v. Yeldell</i> , 274 U.S. 112 (1927)	<i>passim</i>
<i>Malandris v. Merrill Lynch, Pierce, Fenner & Smith</i> , 703 F.2d 1152 (10th Cir. 1981), <i>cert. denied</i> , 464 U.S. 824 (1983)	46
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	35
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	41

TABLE OF AUTHORITIES—Continued

	Page
<i>McCutchen v. Liberty Mutual Ins. Co.</i> , 699 F. Supp. 701 (N.D. Ind. 1988)	22, 47
<i>McDermott v. Kansas Public Service Co.</i> , 238 Kan. 462, 712 P.2d 1199 (Kan. 1986)	47
<i>McDowell v. Key</i> , 557 So. 2d 1243 (Ala. 1990)	43
<i>McGautha v. California</i> , 402 U.S. 183 (1971)	28
<i>Miller v. Cudahy</i> , 858 F.2d 1449 (10th Cir. 1988), cert. denied, 109 S.Ct. 3265 (1989)	22, 46
<i>Minneapolis & St. L. Ry. Co. v. Beckwith</i> , 129 U.S. 26 (1889)	20, 44
<i>Missouri Pacific Ry. Co. v. Humes</i> , 115 U.S. 512 (1885)	20, 44
<i>Missouri Pacific Ry. Co. v. Tucker</i> , 230 U.S. 340 (1913)	44
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	18
<i>Murray's Lessee v. Hoboken Land & Improvement Co.</i> , 59 U.S. 272 (1856)	21
<i>National States Insurance Co. v. Jones</i> , 393 So. 2d 1361 (Ala. 1980)	17
<i>North Carolina Mut. Life Ins. Co. v. Holley</i> , 533 So. 2d 497 (Ala. 1987)	35
<i>Odom v. Gray</i> , 508 S.W.2d 526 (Tenn. 1974)	16
<i>Olson v. Walker</i> , 162 Ariz. 174, 781 P.2d 1015 (Ariz. App. 1989)	47
<i>Osborne v. Ohio</i> , 110 S. Ct. 1691 (1990)	18
<i>Ownbey v. Morgan</i> , 256 U.S. 94 (1926)	21
<i>Palmer v. A.H. Robins Co.</i> , 684 P.2d 187 (Colo. S. Ct. 1984)	26
<i>Parham v. J.R.</i> , 442 U.S. 584 (1979)	19
<i>People v. Superior Court</i> , 12 Cal. 3d 421, 115 Cal. Rptr. 812 (Cal. 1974)	47
<i>Peterson v. Superior Court</i> , 31 Cal. 3d 147, 181 Cal. Rptr. 784 (Cal. 1982)	47
<i>Pezzano v. Bonneau</i> , 133 Vt. 88, 329 A.2d 659 (Vt. 1974)	32
<i>Piedmont Cotton Mills, Inc. v. General Warehouse No. 2</i> , 222 Ga. 164, 149 S.E.2d 72 (1966)	16

TABLE OF AUTHORITIES—Continued

	Page
<i>Potomac Electric Power Co. v. Smith</i> , 79 Md. App. 591, 558 A.2d 768 (1989)	23
<i>Puppe v. A.C. and S., Inc.</i> , 733 F. Supp. 1355 (D.N.D. 1990)	22
<i>R.G. Britton v. Rogers</i> , 631 F.2d 572 (8th Cir. 1980)	41
<i>Ray Dodge, Inc. v. Moore</i> , 251 Ark. 1036, 479 S.W.2d 518 (1972)	16
<i>Reinhardt Motors, Inc. v. Boston</i> , 516 So. 2d 509 (Ala. 1987)	35
<i>Rogers v. State</i> , 582 S.W.2d 7 (Ark. 1979)	42
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982)	29
<i>Schall v. Martin</i> , 467 U.S. 253 (1984)	27
<i>Sero v. Oswald</i> , 351 F. Supp. 522 (S.D.N.Y. 1972)	42
<i>Shevlin-Carpenter Co. v. Minnesota</i> , 218 U.S. 57 (1910)	13, 16
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984)	19
<i>Smith v. Follette</i> , 445 F.2d 955 (2d Cir. 1971)	42
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974)	40
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	20
<i>Snyder v. Commonwealth of Massachusetts</i> , 291 U.S. 97 (1934)	21
<i>Solem v. Helm</i> , 463 U.S. 277 (1983)	45
<i>Southern Life & Health Insurance Co. v. Whitman</i> , 358 So. 2d 1025 (Ala. 1978)	25
<i>Southwestern Tel. & Tel. Co. v. Danaher</i> , 238 U.S. 482 (1915)	44
<i>St. Louis, I.M. & S. Ry. Co. v. Williams</i> , 251 U.S. 63 (1919)	44
<i>Standard Oil Co. v. Missouri</i> , 224 U.S. 270 (1912) ..	22
<i>State Farm Fire & Cas. Ins. Co. v. Lynn</i> , 516 So. 2d 1371 (Ala. 1987)	35
<i>State Farm Mut. Auto. Ins. Co. v. Robbins</i> , 541 So. 2d 477 (Ala. 1989)	35
<i>Stevens v. Armontrout</i> , 787 F.2d 1282 (8th Cir. 1986)	41
<i>Stoner v. Nash Finch, Inc.</i> , 446 N.W.2d 747 (N.D. 1989)	22

TABLE OF AUTHORITIES—Continued

	Page
<i>Stotler and Co. v. C.F.T.C.</i> , 855 F.2d 1288 (7th Cir. 1988)	16
<i>Stroud v. Denny's Restaurant, Inc.</i> , 271 Or. 430, 532 P.2d 790 (1975)	16
<i>Sun Oil Co. v. Wortman</i> , 108 S. Ct. 2117 (1988)	21
<i>Toole v. Richardson-Merrell Inc.</i> , 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (Cal. 1967)	47
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927)	18
<i>United Services Auto Ass'n v. Wade</i> , 544 So. 2d 906 (Ala. 1989)	35
<i>Unified School District No. 490 v. Celotex Corp.</i> , 6 Kan. App. 2d 346, 629 P.2d 196 (1981)	47
<i>United States v. A&P Trucking Co.</i> , 358 U.S. 121 (1958)	13
<i>United States v. Baker</i> , 429 F.2d 1344 (7th Cir. 1970)	42
<i>United States v. Balint</i> , 258 U.S. 250 (1922)	13, 16
<i>United States v. Davis</i> , 801 F.2d 754 (5th Cir. 1986), <i>cert. denied</i> , 484 U.S. 833 (1987)	41
<i>United States v. Dotterweich</i> , 320 U.S. 277 (1948)	16
<i>United States v. Freed</i> , 401 U.S. 601 (1971)	16
<i>United States v. Park</i> , 421 U.S. 658 (1975)	16
<i>United States v. Ward</i> , 448 U.S. 242 (1980)	47
<i>United States v. Wivell</i> , 893 F.2d 156 (8th Cir. 1990)	41
<i>Vines v. Muncy</i> , 553 F.2d 342 (4th Cir.), <i>cert. denied</i> , 434 U.S. 851 (1977)	42
<i>Walters v. National Ass'n of Radiation Survivors</i> , 473 U.S. 305 (1985)	14, 19
<i>Walton v. Arizona</i> , 1990 U.S. Lexis No. 3462 (1990)	28, 34, 36
<i>Waters-Pierce Oil Co. v. Texas</i> , 212 U.S. 86 (1909)	44
<i>Weaver v. Graham</i> , 450 U.S. 24 (1981)	47
<i>Williams v. Ralph Collins Ford-Chrysler, Inc.</i> , 551 So. 2d 964 (Ala. 1989)	35
<i>Williamson v. Lee Optical</i> , 348 U.S. 483 (1955)	11
<i>Wilson v. Dukona Corp., N.V.</i> , 547 So. 2d 70 (Ala. 1989)	32, 35
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	41

TABLE OF AUTHORITIES—Continued

STATUTES:	Page
7 U.S.C. § 4a (1988)	16
11 U.S.C. § 303(i) (2) (B) (1988)	19
11 U.S.C. § 362(h) (1988)	19
11 U.S.C. § 363(n) (1988)	19
12 U.S.C. § 3417(a) (3) (1988)	19
15 U.S.C. § 78u(h) (7) (A) (iii) (1988)	19
15 U.S.C. § 298(c) (1988)	19
15 U.S.C. § 1116(d) (11) (1988)	19
15 U.S.C. § 1681n(2) (1988)	19
26 U.S.C. § 7431(c) (1) (B) (ii) (1988)	19
33 U.S.C. § 1514(c) (1988)	19
42 U.S.C. § 1983 (1988)	20
Ala. Ins. Co. § 27-8-5 (Michie ed. 1989 Supp.)	12
Ala. Ins. Code § 27-3-21 (Michie ed. 1989 Supp.) ..	45
D.C. Code § 22-2801 (1981)	41
Mich. Code § 750.317	41
Ohio Rev. Code Ann. § 2307.80(B) (1988)	34
Montana Code § 27-1-221	34
Texas Crim. Code § 12.32	41
Va. Code § 18.2-58 (1950 & 1990 Supp.)	41
MISCELLANEOUS:	
Annual Statement of Pacific Mutual Life Insurance Company to the Insurance Department of the District of Columbia for the Year Ended December 31, 1987	37
J. Ghiardi and J. Kircher, <i>Punitive Damages Law and Practice</i> § 21.02 (1985)	34
Products Liability: Verdicts and Case Resolution in Five States (GAO/HRD-88-99, Sept. 1989) ..	24
<i>Punitive Damages: A Constructive Examination</i> (Report of the Special Committee on Punitive Damages, Section of Litigation, American Bar Association) (Nov. 1986)	24
Restatement 2d of Agency § 261	12
S. Daniels & J. Martin, <i>Myth and Reality in Punitive Damages</i> (ABF Working Paper #8911)	23

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Petitioner Pacific Mutual Life Insurance Company has raised a host of substantive and procedural due process challenges to the punitive damages assessed against it in this case. To lend credence to its demands for unprecedented constitutional "reform" of punitive damages law, Pacific Mutual has described this as a case in which a runaway jury assessed massive punitive liability wholly disproportionate to the minimal actual harm suffered by respondents, and then imposed that liability on Pacific Mutual even though the fraud that injured respondents was perpetrated by the agent of a different insurance company.

The record tells a different story. The only respondent who received a sizable award, Cleopatra Haslip, suffered devastating financial and emotional harm. After incurring hospital bills equivalent to almost half her *annual*

take home pay, she discovered her insurance coverage did not exist because her premiums had been stolen by Pacific Mutual's agent, Lemmie Ruffin. She was completely unable to pay her bills. Her creditors obtained still-unsatisfied judgments against her, which ruined her previously solid credit rating—a matter of particularly grave concern to persons of limited means.¹

As will be shown, the jury in this case specifically found, on the basis of ample evidence, that Ruffin was acting as an employee of Pacific Mutual when he defrauded respondents, and the Alabama Supreme Court affirmed that factual finding. The jury also heard ample evidence that Pacific Mutual stood idly by after receiving clear notice of earlier frauds by Ruffin, and of the specific likelihood he was defrauding respondents. Indeed, Pacific Mutual's Birmingham agency manager and Pacific Mutual's home office knowingly took actions essential to consummation of the fraud, even though those actions violated company policy and industry practice.

1. *Scope of Employment.* It is undisputed that Ruffin had actual authority to sell Pacific Mutual life insurance

¹ In January 1982, Haslip was hospitalized for a serious kidney infection. She expected Pacific Mutual to pay everything above the \$100 deductible but discovered she had no coverage. Because she was depending on her insurance, she could not pay any of her bill. The hospital would not discharge her until she paid a portion of it, so her daughter was forced to come up with several hundred dollars to obtain Haslip's release. Even so, Haslip still owed the hospital more than \$2,000, the urologist \$300 and another physician \$600. Not surprisingly she was unable to cope with those debts. She was successfully sued by the hospital and the urologist. The suits destroyed her credit. She sought to live without credit, and pay back these debts, since 1982. See Record Transcript ("RT") at 101-104, 173-179, 187-195.

Mrs. Haslip's injury was compounded by Ruffin's egregious conduct. While she was hospitalized, Haslip telephoned Ruffin to verify her insurance number. Ruffin—evidently realizing that his fraud was about to be discovered—argued with Haslip over the proper amount of the deductible, threatened to cancel her policy and thereafter sent a mailgram purporting to cancel her insurance. RT at 184-85, 196-200, 231-33.

policies to respondents, that Pacific Mutual derived some economic benefit from sales to respondents, and that Ruffin defrauded respondents by stealing most of their life insurance premiums. Thus Pacific Mutual cannot plausibly claim Ruffin was acting wholly as the agent of a different company—Union Fidelity—when he defrauded respondents. Nor is there merit to Pacific Mutual's claim that when Ruffin sold group *health* insurance to respondents he was acting as an agent not of Pacific Mutual, but of Union Fidelity. As the Alabama Supreme Court found, there "is no question that sufficient evidence existed to support the jury's determination that Lemmie Ruffin and his agency manager . . . were acting within the line and scope of their employment with Pacific Mutual when Ruffin made the representations to plaintiffs that became the subject of this suit." Pet. App. B 9.²

Ruffin gave respondents a single proposal for both life and health insurance, on Pacific Mutual letterhead using Pacific Mutual's home office address in California.³ The words "Union Fidelity" were typed in much smaller characters in the body of the proposal beneath the Pacific Mutual logo, but there was no indication that Union Fidelity was an unaffiliated insurance company. The trial court's post-verdict order found that Ruffin told respondents their health insurance would be issued by Pacific Mutual directly, or by "a subsidiary of Pacific Mutual." Pet. App. A 2; see also, *id.* at A 4-5.⁴

² Ruffin admitted, for example, that throughout his dealings with respondents, he always represented himself "as an agent of Pacific Mutual Company." When asked, "at any time that you sold insurance, were you ever acting in a capacity other than as a representative of Pacific Mutual Insurance Company?" Ruffin answered "no." JA 71 (emphasis added). See also Ruffin, RT at 477, JA 73; Poindexter, RT at 96, 98-99; Haslip, RT at 170; Calhoun, RT at 302-303; Craig, RT at 330; Hargrove, RT at 278; PX 1.

³ PX 2, JA 113; Ruffin, RT at 438; Haslip, RT at 171-172; Calhoun, RT at 306.

⁴ See Craig, RT at 330, 332; Calhoun, RT at 304, 316-317; Haslip, RT at 206, 212, 244-246. The City Clerk testified she understood

Ruffin's packaging of Pacific Mutual life insurance and Union Fidelity health insurance was not at all unusual. Although Pacific Mutual's internal policies did not permit the sale of Pacific Mutual group health insurance to municipal employees, Pacific Mutual *encouraged* its agents to package Pacific Mutual life insurance with health insurance from other companies. This corporate strategy was designed to boost sales of Pacific Mutual life insurance by minimizing the loss of municipal customers who wanted *both* life and health coverage. RT 429, 431.

There were further reasons for respondents to believe Ruffin was acting as Pacific Mutual's agent. Ruffin was Pacific Mutual's "employee." Trial Court Order, Pet. App. A 2. He worked exclusively out of a Pacific Mutual branch office for which "the home office footed all the bills." Ruffin, RT at 415.⁵ Each month Ruffin delivered a single invoice to the City of Roosevelt for both the life and health insurance premiums, and each invoice came from Ruffin's "office at Pacific Mutual . . . on Pacific Mutual letterhead." Ruffin, RT at 448. Those invoices did not mention Union Fidelity and did not indicate that there were two insurance companies, or even two insurance policies. Poindexter, RT at 126, 141. To the contrary, the City was billed a single amount for all respondents, for "the master policy." PX 7, JA 114.

Ruffin misappropriated most of those premiums. Although respondents' policies were cancelled for nonpayment after a month or two, they never received notices of cancellation, and therefore continued to pay monthly premiums to Ruffin. The trial court found that respond-

that Union Fidelity "was a subsidiary of Pacific Mutual," because Ruffin told her that Union Fidelity "was just the hospital part of Pacific Mutual." Poindexter, RT at 99-100; *id.* at 117, 120.

⁵ The branch office "was not a franchise type deal." Ruffin, RT at 416. The Manager, Mr. Lupia, was "an employee of the company," which paid "all the expenses." The Manager had "to operate within this budget." *Id.*

ents did not know their policies had been cancelled "because the cancellation notice[s] from *both* Union Fidelity and Pacific Mutual were sent to Ruffin who continued to collect premiums from Roosevelt City." Pet. App. A 2 (emphasis added).⁶ An expert on the insurance industry testified that it "is not standard for the insurance industry" to send cancellation notices to the agent, rather than to the policy owner—because that facilitates precisely the type of fraud that ensued here. Giaser, JA 78.

In determining a punitive amount necessary to deter similar frauds in the future, the jury had ample basis to conclude that if Pacific Mutual had not mailed its cancellation notices to Ruffin, rather than to respondents, in violation of industry standards, the fraud against respondents *could not have occurred*; respondents would have known their insurance had been cancelled and would have withheld further premiums.⁷

2. *Notice.* Almost a year before the frauds at issue here, Pacific Mutual received explicit and repeated notice that Ruffin was engaged in a *pattern* of frauds *identical* to those Ruffin later perpetrated against respondents. Deborah Ault was the "personal secretary" for Patrick Lupia, the Manager of Pacific Mutual's Birmingham office. Ault, RT at 352, 350. She testified that "beginning in November of 1980," and continuing for approximately "eight or nine months," she received telephone

⁶ *Id.* at A 14: "Ruffin had the cancellation notices sent to him from California."

⁷ Respondents would naturally have inquired why their life insurance had lapsed for non-payment, even though they had made all monthly payments on time. These inquiries would also have alerted them to the identical problem with their health insurance policies. Respondents all testified that they had received no cancellation notices from Pacific Mutual or Union Fidelity. Haslip, RT at 201; Craig, RT at 333, 330; Calhoun, RT at 308-310; Hargrove, RT at 281-282. *See also*, PX 14, JA 118; PX 16, JA 120; PX 17, JA 121; Ralph Passman, RT at 256, 268; *see also id.* at 271 and 393-395, JA 68-70.

calls "[t]wo or three times a week" complaining about Ruffin. JA 75. It was always the "same complaint." Ault, RT at 503. The callers told her "that they had purchased insurance with our company through Lemmie Ruffin," but "when they had submitted a claim . . . they were informed that they did not have insurance with us." JA 74. Ault invariably gave that information to Pacific Mutual's Birmingham manager, who repeatedly told her "that he would talk with Lemmie about it and they would take care of the problem." JA 75.

The trial court ruled that Ault's testimony could be considered by the jury "on questions of notice to the defendant Pacific Mutual Insurance Company." JA 74-75.⁸ The Alabama Supreme Court also ruled that Ault's testimony was admissible "to prove *Pacific Mutual's* notice of the fraud," and found that "Ault's testimony showed that *Pacific Mutual* had received notice" of those complaints. Pet. App. B 11 (emphasis added).

Pacific Mutual also had notice, through its Birmingham manager, that Ruffin was *repeatedly* soliciting and receiving monthly premiums payable to Ruffin, on policies issued by *Pacific Mutual*. Ruffin, JA 71; PX 6. Ault testified that when Ruffin showed her premium checks made out to him, she informed the Manager that Ruffin was personally receiving premium checks in violation of company policy. JA 76-77. Ruffin continued to violate the policy even though Ault "went through the same process" of notifying the Manager "several" times. JA 77.⁹ Thus,

⁸ The trial court found that the Manager "had notice of past problems with Mr. Ruffin including, but not limited to, prior acts of fraud." Pet. App. A 14-15.

⁹ Inexplicably, Pacific Mutual now argues that "[n]o evidence showed that [its Manager] was aware that Mr. Ruffin was collecting premiums contrary to his contract." Pet. Br. at 27; *id.* at 5. At trial, Pacific Mutual's lawyer *conceded* Ault gave that information to the Manager, and simply tried to establish that the Manager had told Ruffin not to do that any more. JA 77.

Pacific Mutual also had notice that Ruffin was *repeatedly* violating *Pacific Mutual's* stated policy in the very way Ruffin would later use to defraud respondents. Without that violation, the frauds against respondents could not have occurred.

Indeed, as the Alabama Supreme Court found, "*Pacific Mutual's home office* had received complaints regarding Ruffin's fraudulent activities *but had done nothing about them.*" Pet. App. B 9 (emphasis added). Instead, *Pacific Mutual itself* initiated contact with respondents to solicit their business, *and specifically directed respondents to contact Ruffin.*¹⁰ Given these facts, the jury had ample reason to conclude that Pacific Mutual was indifferent to fraudulent activities by its agents, and that a substantial punitive award would be necessary to change that conduct.

3. *Alabama's Procedures.* The jury in this case was instructed—as juries across the Nation have been instructed for 200 years—that it could impose punitive damages to "punish the defendant" and to protect "the public by deterring the defendant and others from doing such wrong in the future." JA 105-106. The jury was further instructed that it should "take into consideration the character and the degree of the wrong," but that its evaluation had to be constrained by what was "shown by the evidence." JA 106. Pacific Mutual raised no contemporaneous objection to any alleged lack of specificity in this instruction, and did not propose a more particularized charge. See note 35 *infra*. The jury was also instructed that Pacific Mutual could be liable for punitive as well as compensatory damages only if Ruffin was acting within the scope of his employment for Pacific Mutual when he defrauded respondents. JA 101-107. No evidence of Pacific Mutual's financial position was provided to the jury.

¹⁰ RT at 78-79, 821-822. See also, Ruffin, RT at 414, 431-433.

The trial judge subjected the jury's punitive damages verdict to exacting post-verdict scrutiny. In conformity with the substantive and procedural requirements of *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), the court conducted a hearing at which Pacific Mutual was free to present evidence and make arguments demonstrating the excessiveness of the punitive award. After the hearing, the trial judge entered a written statement finding the punitive award to be within a reasonable range in light of the evidence and the substantive criteria set forth in *Hammond* for evaluating potential excessiveness. The Alabama Supreme Court likewise subjected the verdict to substantive scrutiny, and affirmed.

SUMMARY OF ARGUMENT

Pacific Mutual urges this Court to "reform" punitive damages by (i) creating substantive due process law to supplant state rules that determine when a corporation can be held liable for the acts of its employees; (ii) discarding the standards and procedures devised by the Alabama Supreme Court for guiding and confining the discretion of juries setting punitive awards; and (iii) imposing an inflexible substantive due process ceiling on the size of punitive awards. These claims should be rejected.

First, Alabama's law of vicarious liability for punitive damages has a rational basis, and thus—like all regulation that does not burden a fundamental right—must be affirmed, as the Court long ago expressly ruled in *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927). Indeed, Alabama's common law of vicarious liability is virtually identical to the vicarious liability principles incorporated by judicial interpretation into the Sherman Act. See *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). (Point I).

Second, Alabama's procedures for assessing punitive damages incorporate traditional common law jury instructions that have never been found unfair or unconstitu-

tional in their 200 year history. In fact, Alabama's procedures offer greater protection than the traditional common law. The jury's award is subjected to exacting post-verdict and appellate scrutiny pursuant to clearly defined substantive standards. Individually and together, Alabama's trial and appellate procedures provided Pacific Mutual with all the process it was due. (Point II).

Third,—as the Alabama courts held—the punitive award against Pacific Mutual was reasonably related to the State's goal of deterring fraud. Accordingly, the award is consistent with any conceivable due process requirement that punitive awards not be grossly excessive. Pacific Mutual's demand for stricter substantive scrutiny of the size of punitive awards would require an inappropriate federalization of state tort law, and is foreclosed by the principles articulated in this Court's recent ruling in *Browning-Ferris Industries, Inc. v. Kelco Disposal Co.*, 109 S. Ct. 2909 (1989) (Point III).¹¹

Adoption of Pacific Mutual's arguments would require this Court to remake its due process jurisprudence in a way that is fundamentally inconsistent with principles of federalism and judicial restraint. Indeed, proceeding from the demonstrably false premise that there has been an "explosion" in the size and frequency of punitive awards,¹² Pacific Mutual is asking this Court, in effect, to legislate an overhaul of state punitive damages law. The Due Process Clause does not justify this radical undertaking.

¹¹ Pacific Mutual's remaining arguments likewise have no merit. (Point IV).

¹² See pp. 23-25 *infra*.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT PROHIBIT VICARIOUS LIABILITY FOR PUNITIVE DAMAGES RESULTING FROM THE FRAUDULENT CONDUCT OF AN AGENT ACTING WITH APPARENT AUTHORITY AND WITHIN THE SCOPE OF HIS EMPLOYMENT.

Pacific Mutual's due process challenge to vicarious liability for punitive damages is based on two arguments: that Ruffin was not acting as its agent when he defrauded respondents;¹³ and that a corporation cannot be held liable for punitive damages for the conduct of its agent unless the corporation was independently at fault or benefitted from the conduct.¹⁴ The first argument ignores the factual record. The second ignores settled principles of constitutional law.

A. The Record Forecloses Any Claim That Ruffin Was Not Acting As Pacific Mutual's Agent When He Committed The Frauds At Issue.

The jury was repeatedly instructed that Pacific Mutual could be held liable for punitive damages *only* if Ruffin was acting within the scope of his employment *with Pacific Mutual* when he defrauded respondents. RT 892-900, JA 101-107. The verdict is thus necessarily based on a factual finding that Ruffin was acting as *Pacific Mutual's* agent when he committed those frauds. The trial court and the Alabama Supreme Court *both* found ample evidence to support that finding.¹⁵ These factual findings are not open to dispute here. *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Accordingly, Pacific Mutual is foreclosed from arguing that Ruffin was not acting as its agent when he defrauded respondents.

¹³ See Pet. Br. at 3, 27; Cert. Pet. at 3, 9, 16.

¹⁴ Pet. Br. at 10; see also *id.* at 31.

¹⁵ Pet. App. A 9; Pet. App. B 9-10 (summarizing that evidence).

B. Alabama's Rule Of Corporate Vicarious Liability Fully Comports With Due Process.

Pacific Mutual's repeated invocation of "fundamental fairness" should not mask the nature of its objection to vicarious liability. Pacific Mutual claims that *substantive* due process supplants Alabama's common law rule that corporations are liable for both compensatory and punitive damages resulting from *all* fraudulent acts of agents and employees within the scope of their employment. Under the Due Process Clause, however, Alabama's vicarious liability rule—like all state economic and public welfare regulation that does not burden a fundamental right—must be upheld if this Court can discern a rational basis for it. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

Alabama's rule—which is also the rule in many other States¹⁶—rationally advances the State's interest in minimizing fraud. Alabama has long applied this rule in the insurance context because the State has a strong interest in deterring fraud by agents and has determined that insurance companies would be more likely to prevent frauds by their agents if given sufficient financial incentive to do so.¹⁷ By imposing exemplary damages on a corporation

¹⁶ See *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972); *Piedmont Cotton Mills, Inc. v. General Warehouse No. 2*, 222 Ga. 164, 149 S.E.2d 72 (1966); *Kiser v. Neumann Co. Contractors, Inc.*, 426 S.W.2d 935 (Ky. 1967); *Goddard v. Grand Trunk Ry. of Canada*, 57 Me. 202 (1869); *Hairston v. Atlantic Greyhound Corp.*, 220 N.C. 642, 18 S.E.2d 166 (1942); *Kurn v. Radencic*, 193 Okla. 126, 141 P.2d 580 (1943); *Stroud v. Denny's Restaurant, Inc.*, 271 Or. 430, 532 P.2d 790 (1975); *Chuy v. Philadelphia Eagles*, 595 F.2d 1265 (3rd Cir. 1979) (applying Pennsylvania law); *Hopper v. Hutto*, 160 S.C. 404, 158 S.E. 726 (1931); *Odom v. Gray*, 508 S.W.2d 526 (Tenn. 1974).

¹⁷ See *British General Insurance Co. v. Simpson Sales Co.*, 93 So. 2d 763, 768 (Ala. 1957). This common law rule supplements a legislative determination that insurance companies should be held responsible for the wrongful acts of their agents when, as in this case, the company has applied for a license for the agent and has

when its agents or employees commit intentional fraud, the rule creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be prevented."¹⁸

Encouraging such vigilance is particularly appropriate in the insurance context. Insurance is essential to the personal security and financial planning of most Americans.¹⁹ Fraud by an insurance agent depends for its success on the agent's status and credibility as a representative of the insurance company. Victims entrust insurance agents with their money—and thus their personal and financial security—precisely because they believe an agent is backed by the good name and financial resources of the insurance company the agent represents.²⁰ For these reasons, Alabama—and every other State—imposes special obligations on insurance companies to ensure agents are trustworthy.²¹ Vicarious imposition of punitive liability for insurance fraud works in tandem with these regulations to encourage effective corporate oversight.

If corporations were liable for exemplary damages only upon proof that they were independently at fault, they

certified that the agent is worthy of public trust. See *Cincinnati Ins. Co. v. City Of Talladega*, 342 So. 2d 331, 337 (Ala. 1977). See also n.21 *infra*.

¹⁸ *Pizitz*, 274 U.S. at 116 (upholding Alabama's rule of vicarious liability).

¹⁹ Ruffin's fraud created a serious risk that respondents would die without the life insurance coverage that would have been the mainstay of their families' financial security, and also risked devastating consequences in case of serious illness, as befell respondent Haslip.

²⁰ Restatement 2d of Agency § 261 comment a, at p. 571.

²¹ For example, Alabama requires insurance companies to investigate the "character and background" of their agents and to certify that they are "trustworthy." Ala. Ins. Code § 27-8-5 (Michie ed. 1989 Supp.).

would have strong incentive to *minimize* oversight of their agents; the less they knew about their agents' conduct, the less likely they would be found at fault for failing to prevent a fraud. Furthermore, fraud victims often have great difficulty pinpointing corporate fault, and still more difficulty proving it.²² Because imposing vicarious liability without fault deters more fraud than would a less stringent rule, it rationally advances Alabama's goals.

Indeed, Alabama's policy choice is identical to that embodied in the federal antitrust laws. See *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). In *Hydrolevel*, this Court adopted a rule of vicarious liability for treble damages under the antitrust laws that seeks to achieve deterrence in a way indistinguishable from the Alabama rule at issue here. The Court held that a principal is liable for treble damages for antitrust violations by agents acting with apparent authority, even if the principal was without fault and did not benefit. If the principal is civilly liable for violations by its agents acting with apparent authority, "[p]ressure will be brought on [the organization] to see to it that [its] agents abide by the law." *Id.* at 572 (quoting *United States v. A&P Trucking Co.*, 358 U.S. 121, 126 (1958)).

Hydrolevel expressly rejected, in the antitrust context, the substantive limitations Pacific Mutual argues are required by the Due Process Clause. Requiring fault, the Court held, would permit the principal to "avoid liability by ensuring that it remained ignorant of its agents' conduct, and . . . would therefore encourage [it] to do as

²² *Cf. United States v. Balint*, 258 U.S. 250, 254 (1922) ("considerations as to the opportunity . . . to find out the fact [essential to liability] and the difficulty of proof" support imposing liability without fault); *Sherlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 69 (1910) (imposing liability for civil fine without fault appropriate where "offenders were difficult to detect, or, if detected, the character of their acts . . . equally difficult to establish" in court).

little as possible to oversee its agents." *Id.* at 573.²³ The *Hydrolevel* Court also rejected any benefit requirement; whether the principal benefitted from the conduct "is simply irrelevant" to the law's purposes. "[A]gents can have the same anticompetitive effects on the marketplace," when "act[ing] solely to benefit themselves." *Id.* at 574.²⁴ Whether or not one agrees with the *Hydrolevel* majority that vicarious liability without fault or benefit is the best rule, *Hydrolevel* makes clear that it is rational. Due Process requires no more.

Even in the "fortunately long gone" era of strict substantive due process scrutiny of state economic regulation,²⁵ a unanimous Court in *Pizitz* rejected a due process challenge indistinguishable from the one raised here. At issue was the constitutionality of Alabama's wrongful death statute, which imposed punitive damages on employers for the conduct of employees. A corporate employer had been found liable for punitive damages as a

²³ In a *Hydrolevel* amicus brief, the United States supported vicarious liability without fault for precisely this reason. Otherwise, the United States explained, principals "would have a strong incentive to minimize their supervision and investigation of potentially anticompetitive practices. To the extent the organization succeeded in looking the other way, it would be free from liability and could rely with confidence on the defense that the acts of its agents were 'undertaken without the knowledge or consent of the organization.'" Brief For The United States As Amicus Curiae, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, No. 80-1765 (filed October 22, 1981), at 26.

²⁴ Furthermore, Pacific Mutual's "benefit" argument is not properly before the Court, because Pacific Mutual did not request an instruction that it could be found liable for punitive damages only if it benefitted from the fraud. Nor did it advance a "benefit" argument in its motion for directed verdict, motion for judgment NOV, or for new trial, in the Alabama Supreme Court, or even in its petition for certiorari in this Court.

²⁵ See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985).

result of its employee's negligence, but no evidence suggested fault on the part of the employer. Relying on *Lochner v. New York*, 198 U.S. 45 (1905), and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), the employer argued that the Alabama statute was "violative of the fundamental conceptions of fair play, and contrary to natural justice and therefore repugnant to the 14th Amendment," because the "relationship of master and servant affords no basis for punishing vicariously the innocent master."²⁶

Rejecting that argument, the Court found that the goal of the Alabama statute was "to strike at the evil . . . by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it." 274 U.S. at 116 (emphasis added).²⁷ As the *Pizitz* Court held:

The principle of respondeat superior itself and the rule of liability of corporations for the willful torts of their employees, extended in some jurisdictions . . . to liability for punitive damages, . . . are recognitions by the common law that the imposition of liability without personal fault, having its foundation in a recognized public policy, is not repugnant to accepted notions of due process of law.

Id. at 115 (citations omitted). Thus, in *Pizitz*, as in *Hydrolevel* 55 years later, the Court recognized the deterrent purposes served by vicarious imposition of puni-

²⁶ See Brief on Behalf of Plaintiff in Error, *Louis Pizitz Dry Goods Co. v. Yeldell*, No. 171 (filed Jan. 27, 1927) at 6, 24. See *id.* at 20-21 (quoting at length from *Lochner* and *Adkins*).

²⁷ Here, Pacific Mutual could easily have prevented Ruffin's frauds. For example, Pacific Mutual's home office could simply have followed industry standards and refused to divert cancellation notices from respondents to Ruffin. That act alone would have prevented the frauds at issue. Or it could have acted on notice of Ruffin's pattern of fraudulent conduct and dismissed or at least closely monitored him.

tive damages for the acts of agents and employees taken within the scope of their employment.²⁸

Indeed, this Court's decisions in a broad range of civil and even criminal contexts make clear that imposing liability without fault is not fundamentally unfair and does not violate the Due Process Clause. See *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910); *United States v. Park*, 421 U.S. 658, 670 (1975); *United States v. Balint*, 258 U.S. 250, 252 (1922); see also *United States v. Freed*, 401 U.S. 601, 607 (1971); *United States v. Dotterweich*, 320 U.S. 277, 284 (1948). These decisions uniformly recognize the sound policy reasons supporting imposition of liability without fault, especially where fault would be difficult to detect and prove. *Balint*, 258 U.S. at 254; *Shevlin-Carpenter*, 218 U.S. at 69.

Acceptance of Pacific Mutual's argument would invalidate a multitude of state and federal laws. The common law of vicarious liability in force in many States, the criminal statutes at issue in *Balint*, *Freed*, *Park* and *Dotterweich*, and numerous other state and federal laws imposing liability without fault would be nullified. The theory of Sherman Act vicarious liability adopted in *Hydrolevel* could not survive, nor could several crucial federal statutes regulating financial markets.²⁹

²⁸ Pacific Mutual, and several *amici*, have tried to distinguish *Pizitz* on the spurious ground that the statute at issue did not impose punitive liability, but compensatory relief. The sole shred of support for this contention is a phrase in the opinion indicating that the statute's purpose is "remedial." 274 U.S. at 114. As the surrounding passage in the opinion makes clear, however, when the Court described the statute as "remedial," it meant that the statute was aimed at *detering* "death by wrongful act or omission," and thus, like all exemplary damages, had deterrent objectives.

²⁹ For example, Section 4a of the Commodities Exchange Act expressly holds corporate principals liable for violations by their employees and agents, with no requirement of fault or benefit on the part of the corporation. 7 U.S.C. § 4a. See *Stotler and Co. v.*

Alabama has made a rational choice among competing policy considerations. That other accommodations of these competing interests might also be rational—or even preferred by individual judges—is not material to this Court's constitutional analysis. If the People of Alabama or other States decide they prefer the substantive rule Pacific Mutual urges, "[t]hey may create such a system . . . by changing the tort law of the State in accordance with the regular law-making process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment." *DeShaney v. Winnebago County Dep't of Social Se. vices*, 109 S. Ct. 998, 1007 (1989).³⁰

II. THE PUNITIVE DAMAGE AWARD WAS THE PRODUCT OF FAIR, RATIONAL AND RELIABLE PROCEDURES THAT SATISFY ALL REQUIREMENTS OF DUE PROCESS.

Alabama provided Pacific Mutual with all the traditional protections that afford due process in civil proceedings. It is undisputed that Alabama's exercise of jurisdiction comported with "traditional notions of fair

C.F.T.C., 855 F.2d 1288, 1291 (7th Cir. 1988) (upholding vicarious liability for civil fine; "it does not matter if the principal participated in, or even knew about the agent's acts").

³⁰ In every other respect, the imposition of vicarious liability on Pacific Mutual was consistent with the due process requirement of fundamental fairness. Alabama case law provided clear notice, long before the frauds at issue, that Pacific Mutual could be held vicariously liable for substantial punitive damages for the intentionally fraudulent acts of its agents acting within the line and scope of their duty, even if Pacific Mutual was not at fault and did not benefit. See *National States Insurance Co. v. Jones*, 393 So. 2d 1361, 1367, 1368 (Ala. 1980), quoting from *Old Southern Life Insurance Co. v. McConnell*, 52 Ala. App. 589, 296 So. 2d 183, 186 (1974).

play and substantial justice,"³¹ and that Pacific Mutual was afforded notice,³² a meaningful pre-deprivation opportunity to be heard,³³ and a neutral decisionmaker.³⁴

Pacific Mutual, however, seeks more. Without suggesting what *would* satisfy its expanded vision of Due Process, Pacific Mutual contends that Alabama's standards for assessing punitive damages are inadequate.³⁵ Because Alabama superimposes comprehensive standards that trial and appellate courts apply when reviewing punitive awards, Pacific Mutual is forced to argue that even post-trial and appellate application of detailed standards does not suffice. Pet. Br. at 40-41.

Pacific Mutual's argument for unprecedented due process restrictions on traditional state procedures cannot be

³¹ See *Burnham v. Superior Court of California*, 110 S. Ct. 2105 (1990) (quotation omitted).

³² See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

³³ See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985).

³⁴ See *Tumey v. Ohio*, 273 U.S. 510 (1927).

³⁵ Pacific Mutual now objects to the standards the jury employed to assess punitive damages. Yet, Pacific Mutual raised no contemporaneous objection to the *standards* comprised in the trial court's instruction. RT at 910-17. In fact, even on the issue of entitlement to punitive damages, Pacific Mutual merely requested the following general instruction:

Before you can award the plaintiffs any punitive damages in this case, you must be reasonably satisfied from the evidence that the conduct of the defendant was such conduct as deserves the imposition of punishment.

Requested Instruction To The Jury By Defendant Pacific Mutual Life Insurance Company, at ¶ 27. Pacific Mutual's requested instruction is less specific than that given by the trial court. In the absence of a specific objection to the trial court's instructions, Pacific Mutual should not now be heard to object to the lack of standards. It gave the trial court no opportunity to consider whether more specific standards might be appropriate. Cf. *Osborne v. Ohio*, 110 S. Ct. 1691, 1703 (1990).

squared with this Court's repeated admonitions that the Fourteenth Amendment does not impose "a rigid constitutional code of procedural necessities," *Walters*, 473 U.S. at 326, and that "[t]here is no requirement as to exactly what procedures to employ whenever a traditional judicial-type hearing is mandated." *Parham v. J.R.*, 442 U.S. 584, 608 n.16 (1979).

A. Traditional Common Law Standards And Procedures For Assessing Punitive Damages Are Fully Consistent With The Due Process Clause.

Punitive damages "have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).³⁶ Under the traditional common law approach—which governs punitive awards in most States³⁷—the amount of a punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure it is reasonable.

This Court has repeatedly approved that common law method for assessing punitive awards. In 1851, the Court approved the "well-established principle of the common law" that:

[i]n many civil actions, . . . the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. . . . *This has been*

³⁶ The first reported American case in which punitive damages were available is *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791).

³⁷ See Brief *Amicus Curiae* of Nat'l Assoc. of Wholesaler-Distributors, *et al.*, at Appendix. Congress has provided for punitive damages in many instances. See, e.g., 11 U.S.C. § 303(i)(2)(B); 11 U.S.C. § 362(h); 11 U.S.C. § 363(n); 12 U.S.C. § 3417(a)(3); 15 U.S.C. § 78u(h)(7)(A)(iii); 15 U.S.C. § 298(c); 15 U.S.C. § 1116(d)(11); 15 U.S.C. § 1681n(2); 26 U.S.C. § 7431(c)(1)(B)(ii); 33 U.S.C. § 1514(c).

always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.

Day v. Woodworth, 13 How. 363, 371 (1851) (emphasis added). The Court has confirmed its approval several times. In *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885), for example, the Court observed that “[t]he discretion of the jury in [cases permitting punitive damages] is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice.”³⁸ More recently, in *Smith v. Wade*, this Court affirmed the assessment of punitive damages pursuant to 42 U.S.C. § 1983, in a case in which the trial court used the common law method for determining the amount of the award. 461 U.S. 30 (1983). Indeed, the jury charge in *Smith*, which was drawn from standard state punitive damages instructions, was less detailed than the charge at issue here.³⁹

In view of this history, Pacific Mutual cannot plausibly claim that the common law method for assessing punitive

³⁸ In *Barry v. Edmunds*, referring to both compensatory and punitive damages, the Court observed that “nothing is better settled than that in . . . actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict.” 116 U.S. 550, 565 (1886). See also *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 36 (1889) (“propriety and legality” of common law method of assessing punitive damages “have been recognized . . . by repeated judicial decisions for more than a century [and] cannot, therefore, be justly assailed as infringing upon the fourteenth amendment of the constitution of the United States”). The principle was so well-established by 1927 that in *Pizitz*, although the parties briefed this issue in detail, the Court unanimously upheld the punitive award there without even bothering to discuss the claim. See n.42 *infra*.

³⁹ The instruction read: “The amount of punitive or exemplary damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and to deter him and others from like conduct.” 461 U.S. at 33.

damages is so fundamentally unfair as to deny due process. As this Court has repeatedly made clear, “[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.” *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2126 (1988) (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.)).⁴⁰ This Court gives great weight to history when deciding whether particular civil adjudicatory procedures provide due process.⁴¹ See, e.g., *Burnham v. Superior Court of California*, 110 S. Ct. 2105 (1990); *Sun Oil Co. v. Wortman*, 108 S. Ct. at 2126 (1988); see also *Ownby v. Morgan*, 256 U.S. 94, 110-112 (1926); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276-277 (1855). These decisions reflect the common-sense view that longstanding reliance on a particular procedure is powerful evidence that the procedure can be trusted to generate fair results.

Furthermore, as *Day v. Woodworth* makes clear, the common law method for assessing punitive damages was “well-established” before the Fourteenth Amendment was enacted—the “crucial time” for purposes of analyzing Pacific Mutual’s due process claim. See *Burnham*, 110 S. Ct. at 2111. Nothing in the Amendment’s text or history indicates even a remote intention on the part of its framers to overturn the prevailing common law method, or to secure a right in punitive damage cases to additional, unspecified standards beyond what courts had always used.

⁴⁰ See also *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 111-116 (1934) (two hundred year history of challenged practice is crucial to a procedural due process analysis because “[t]he Fourteenth Amendment has not displaced the procedure of the ages”).

⁴¹ For three Members of this Court, the long pedigree of a common law method is conclusive of its constitutionality. See *Burnham v. Superior Court of California*, 110 S. Ct. 2105 (opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy, J.).

Thus it is not surprising that Pacific Mutual's procedural due process claim has been rejected by every court to have addressed it. In *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912), this Court explicitly rejected a challenge indistinguishable from the one Pacific Mutual now raises. Upholding a civil fine, the Court turned aside a due process claim that there was "any invalidity in the judgment because there was no statute fixing a maximum penalty [and] no rule for measuring damages." *Id.* at 285.⁴² Every state and federal court to have considered the question has likewise ruled that the common law method for assessing punitive damages satisfies due process.⁴³

⁴² See also *Pizitz*, 274 U.S. at 112 (upholding Alabama statute authorizing punitive damages for wrongful death against claim that it denied due process because the jury may "fix the penalty according to its unbridled discretion, without any method of ascertainment, and without any limit to the amount it may impose by way of punishment or penalty upon the defendant." Brief for Plaintiff in Error in No. 171, at 6).

⁴³ In *McCutchen v. Liberty Mutual Ins. Co.*, 699 F. Supp. 701 (N.D. Ind. 1988), the court emphasized that "since the earliest of times, Indiana has recognized the need to have juries exercise the discretion which defendant now criticizes," citing to *Taber v. Hutson*, 5 Ind. 322 (1854). Cf. *FDIC v. W.R. Grace & Co.*, 691 F. Supp. 87 (1988) (standards governing the jury's assessment of punitive damages are purposefully flexible to permit the jury to achieve community consensus), *aff'd in relevant part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1524 (1990). Several courts have noted the complete lack of precedent supporting a due process challenge to common law assessment of punitive damages. See *Miller v. Cudahy*, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989); *In re Air Crash Disaster at Sioux City, Iowa*, 734 F. Supp. 1425 (N.D. Ill. 1990); *McCutchen v. Liberty Mutual Ins. Co.*, *supra*.

Several cases have upheld the constitutionality of common law standards no more specific than those in this case. See *Ah You Man v. Raymark Indus.*, 728 F. Supp. 1461 (D. Hawaii 1989) (degree of wrongdoing and amount required to punish); *F.D.I.C. v. W.R. Grace & Co.*, 691 F. Supp. 87 (1988) (amount sufficient to punish and deter); *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (N.D. 1989) (reasonable sum to set an example and punish); *Puppe v. A.C. and S.*,

At bottom, Pacific Mutual urges this Court to condemn a procedure that has produced fair results for 200 years, because changed circumstances have allegedly generated an "explosion of punitive damages claims." Cert. Pet. at 11. Whether or not a perceived change in social conditions would ever justify reassessing the scope of procedural due process in the civil context,⁴⁴ this Court should not do so here.

First, contrary to the claims of Pacific Mutual and certain *amici*, the system is not in crisis. A very recent empirical analysis by the American Bar Foundation found *no* substantial increase in either the frequency or the amount of punitive awards. S. Daniels & J. Martin, *Myth and Reality in Punitive Damages*, 34, 41-45 (ABF Working Paper #8911). Based on a careful nationwide survey of tens of thousands of verdicts, the study found that: the principal empirical claims made by Pacific Mutual and its *amici* are "distorted"; "the general pattern is one of low to modest awards"; and "punitive damages were awarded infrequently." *Id.* at 34, 41-45. The study warned that any judicial and legislative "reforms" of punitive damages systems "are likely to be . . . based on an unfounded (and perhaps manufactured) notion of a crisis." *Id.* at 62-64.⁴⁵

Inc., 733 F. Supp. 1355 (D.N.D. 1990) (amount needed to deter); *Potomac Electric Power Co. v. Smith*, 79 Md. App. 591, 558 A.2d 768 (1989) (amount sufficient to punish and deter). Other cases involved common law standards comparable to those governing the trial court's review of the award in this case. See *Eichen-seer v. Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989); *Horowitz v. Schneider National, Inc.*, 708 F. Supp. 1573 (D. Wyo. 1989); *Guy v. Commonwealth Life Ins. Co.*, 698 F. Supp. 1305 (N.D. Miss. 1988), *aff'd in relevant part*, 894 F.2d 1407 (5th Cir. 1990).

⁴⁴ Compare *Burnham v. Superior Court of California*, 110 S. Ct. 2105 (plurality opinion), *with id.* at 2120 (Brennan, J., concurring in the judgment).

⁴⁵ This study will be published in the October 1990 issue of the Minnesota Law Review (copies have been lodged with the Clerk

In 1989, the United States General Accounting Office published a study likewise concluding that punitive awards correlated strongly with the size of compensatory awards, and that appellate review provided a substantial, well-functioning safeguard against excessiveness. See *Products Liability: Verdict and Case Resolution in Five States* (GAO/HRD-88-99, Sept. 1989) at 29, 31-32, 41, 69. A special committee of the American Bar Association also recently found "no clear evidence of a present or impending crisis in punitive damages." *Punitive Damages: A Constructive Examination*, at 1-2 (Report of the Special Committee on Punitive Damages, Section of Litigation, American Bar Association) (Nov. 1986).

Second, even if punitive awards had increased in frequency or size, it would not follow that current awards are unfair or arbitrary. This Court could not legitimately conclude that current methods for assessing punitive awards are generating unfair results without reviewing the evidence supporting the allegedly excessive awards, and then making a substantive judgment that those awards are irrational. See Point III *infra*. Such a review is not within the proper role of this Court.

Third, the governmental bodies *best* equipped to undertake such review—Congress, state legislatures and the state supreme courts that review punitive awards on their merits—are scrutinizing the procedures and experimenting with a variety of new approaches. No one could seriously contend that the opponents of punitive damages, represented in this Court through a handsome array of politically influential *amici*, are without adequate influ-

of this Court). The principal authority cited to support Pacific Mutual's claim is the RAND study. That study does not, however, provide substantial support for the factual assertions of Pacific Mutual and its *amici*, as the recent ABF study makes clear. See *Myth and Reality in Punitive Damages*, at 31-64. See also *Brief Amicus Curiae* of Trial Lawyers for Public Justice; *Brief Amicus Curiae* of the Consumer Federation of America, at 7-10.

ence in those fora. If a two-hundred-year old judicial procedure is injuring the economy or yielding unfair results, there is no reason to suppose a remedy will not be fashioned in Congress or in state legislatures and state courts.

B. Alabama's Common Law Method For Assessing Punitive Damages Substantially Guides The Discretion Of The Jury, And Subjects The Jury's Assessment To Meaningful Review To Ensure Reasonable Punitive Awards.

Alabama juries are instructed in conformity with the traditional common law method for assessing punitive damages. Standing alone, those jury instructions satisfy the Fourteenth Amendment. But Alabama has gone much further in cabinining the jury's discretion to set a punitive award. The post-trial and appellate review afforded defendants in Alabama provides additional assurance of the fairness of Alabama's procedures.

1. *The Jury Instruction.* The jury was instructed that the purpose of punitive damages is "not to compensate the plaintiff" but to "punish the defendant" and to protect "the public by deterring the defendant and others from doing such wrong in the future." JA at 105-106. The jury was *not* instructed, as Pacific Mutual suggests, to "punish selectively and arbitrarily and to give free reign to bias, prejudice and wealth redistribution inclinations." Pet. Br. at 10, 17. Indeed, all evidence of Pacific Mutual's wealth was excluded from the trial.⁴⁶

Although the punitive damages instruction at issue left the jury with discretion to consider a range of relevant evidence, the jury's discretion was far from untethered. The instructions anchored the jury's deliberations in the state policies sought to be advanced by punitive damages—deterrence and retribution. Furthermore, the jury was

⁴⁶ See *Southern Life & Health Ins. Co. v. Whitman*, 358 So. 2d 1025 (Ala. 1978).

instructed that "in fixing the amount you *must* take into consideration the character and the degree of the wrong *as shown by the evidence.*" JA 106 (emphasis added).

These instructions reasonably accommodated Pacific Mutual's interest in fair, rational decisionmaking and Alabama's interest in meaningful, individualized assessment of appropriate deterrence and retribution. Alabama's approach reflects the historical consensus that no mechanical formula can adequately encompass the variety of case-specific facts that should inform the jury's individualized determination of a punitive award. An amount appropriate for deterrence and retribution in any case will depend on the gravity of the harm inflicted or risked, the potential gain to the defendant from exposing others to that harm, the difficulty of detecting and proving the harmful conduct, remedial measures taken or disdained by the defendant, and numerous other variables. Indeed, reducing the judgment to a mechanical formula may well result in the exclusion of relevant variables, and thus impede the jury's function.

Flexibility advances Alabama's interest in another important way. As several courts have recognized,

it is the relatively indeterminate nature of punitive damages which makes them a valuable tool . . . because the indeterminacy . . . prevents [potential wrongdoers] from being able to predict, within certain limits, how much punitive damages will be awarded and figure such a number into a cost/benefit analysis. Rather than cure a defect, a [potential wrongdoer] might accept the risk of paying a limited punitive award.

Germunio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297, 1302-03 (D.N.J. 1990); accord *Ah You Man v. Raymark Indus.*, 728 F. Supp. 1461, 1467 n.7 (D. Haw. 1989); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. S. Ct. 1984) (*en banc*).

Flexibility is a common and uncontroversial feature of much decisionmaking in our legal system.⁴⁷ Indeed, this Court has repeatedly upheld adjudicatory schemes affording substantial flexibility. For example, in *Schall v. Martin*, 467 U.S. 253 (1984), the Court rejected a due process challenge to New York's standards for detaining accused juvenile delinquents pending trial. Detention was to be imposed if a "serious risk" existed that an accused would commit a crime prior to his or her next court appearance. *Id.* at 278. The detention scheme was challenged on the ground that the "serious risk" standard "fails to channel . . . discretion . . . by specifying the factors on which [the decisionmaker] should rely," and thus results in "intrinsically arbitrary and uncontrolled" decisionmaking. *Id.*

This Court held that because the State's procedures guaranteed notice, an opportunity to be heard, a statement of reasons for the decision, and meaningful appellate review, the Due Process Clause did not require that "the specific factors upon which the . . . judge might rely . . . be specified in the statute." *Id.* at 279. As the Court made clear, if a State has an interest in individualized decisionmaking that takes into consideration "a host of variables which cannot be readily codified," *id.* (quotation omitted), Due Process does not require adjudication controlled by inflexible prescribed criteria. *Accord Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 (1979).

⁴⁷ The discretion exercised under Alabama law in deciding upon punitive damages is no greater than that involved in many substantive areas of the law—such as deciding "the best interests of the child," whether "reasonable care" has been exercised, or whether a fiduciary has exercised "due diligence." Nor is the discretion involved here any greater than that afforded juries deciding how much compensation is appropriate for pain and suffering or mental anguish. Many of the decisions our legal system requires cannot be reduced meaningfully to prescription. It does not follow, however, that decisions made in the absence of precise legislative formulations are arbitrary or unfair. So long as discretion is exercised within reasonable constraints, Due Process is satisfied.

Similarly, in *McGautha v. California*, 402 U.S. 183 (1971), the Court rejected a procedural due process challenge virtually indistinguishable from the one Pacific Mutual now advances. At issue in *McGautha* was the constitutionality of affording juries in capital cases "absolute discretion" to decide whether the death sentence should be imposed. *Id.* at 185.⁴⁸ The defendant argued that the absence of specific legislative standards to guide the jurors' exercise of sentencing discretion rendered their decision intrinsically arbitrary. The Court, however, found "it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases" amounted to a denial of Due Process. *Id.* at 207.⁴⁹

Schall and *McGautha* involved constitutional interests of the highest order. The Fourteenth Amendment cannot require more process for punitive damage judgments than for judgments about liberty, or life itself.

2. *Post-Verdict Review In The Trial Court.* Even if the jury instruction standing alone left some doubt whether Pacific Mutual was denied due process—and it

⁴⁸ The jury was instructed that it was "entirely free to act according to your own judgment, conscience and absolute discretion" and that "the law itself provides no standard for the guidance of the jury in the selection of the penalty." 402 U.S. at 189-190 (quoting jury instruction).

⁴⁹ Of course, the Court subsequently held in *Furman v. Georgia*, 408 U.S. 238 (1972), that the Cruel and Unusual Punishments Clause of the Eighth Amendment did require greater specificity in standards guiding sentencing in capital cases. That ruling does not, however, undermine the force of *McGautha* in the present context. First, *Furman* was premised on the exceptional need for accuracy and fairness "on a matter so grave as the determination whether a human life should be taken." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion). Second, *Furman* reflects the Eighth Amendment's special concern with preventing unusual punishment. See *Walton v. Arizona*, 1990 U.S. Lexis No. 3462 (1990) (Scalia, J., concurring in the judgment).

does not—this Court has repeatedly made clear that jury instructions must be evaluated in the context of the entire process afforded a defendant:

[I]t must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment. . . . [T]he question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected *the entire trial* that the resulting conviction violates due process.

Cupp v. Naughton, 414 U.S. 141, 146-147 (1973) (emphasis added); see also *Donnelly v. DiChristoforo*, 416 U.S. 637, 642 (1974).⁵⁰ Accordingly, Pacific Mutual's procedural due process argument must be considered in light of the *entire* process Alabama uses in imposing punitive damages.

By the time of the trial, the Alabama Supreme Court had established additional post-trial procedures for scrutinizing punitive awards. In *Hammond*, the Supreme Court required trial courts to hold post-verdict hearings to examine awards of exemplary damages. To ensure reasoned decisionmaking and meaningful appellate review, *Hammond* required trial courts to provide written

⁵⁰ See also *Santosky v. Kramer*, 455 U.S. 745, 775 (1982) (Rehnquist, J., dissenting) (emphasis in original):

[I]t is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision of the challenged statutory scheme. Such a focus threatens to overlook factors which may introduce constitutionally adequate protections into a particular government action. Courts must examine *all* procedural protections offered by the State, and must assess the *cumulative* effect of such safeguards. . . . Only through such a broad inquiry may courts determine whether a challenged governmental action satisfies the due process requirement of "fundamental fairness."

explanations when affirming or reducing such awards. *Id.* at 1379. *Hammond* also set forth the following specific substantive standards to guide post-verdict and appellate review: (1) "the culpability of the defendant's conduct"; (2) "the desirability of discouraging others from similar conduct"; (3) "the impact on the parties"; and (4) "the impact upon innocent third parties." *Id.* Defendants are permitted in such hearings to submit additional evidence bearing on the appropriateness of the punitive award, including evidence of their financial circumstances (which is excluded during the jury trial).

Hammond thus provides detailed substantive standards by which trial courts determine whether punitive damage awards are excessive. The post-verdict procedures give defendants ample opportunity to challenge the propriety of such awards. The trial court's statement of reasons provides an articulated, reasoned basis for the award, and permits meaningful appellate review.

3. *Review By The Alabama Supreme Court.* Review by the Alabama Supreme Court provides a substantial *additional* check on the jury's discretion. Pacific Mutual dismisses Alabama's appellate review of punitive awards on the ground that "extraordinary deference is given to the jury's decision," which "will *only* be disturbed if it is, in the judgment of the reviewing court, so excessive as to show that it must have been the product of *bias, passion, prejudice, corruption or other improper motive.*" Pet. Br. at 44 (emphasis added). That assertion, however, is demonstrably outdated.⁵¹

Beginning with *Hammond* in 1986, the Alabama Supreme Court has established *additional* tests for reviewing allegedly excessive punitive awards. First, the state supreme court undertakes a comparative analysis to ensure a particular punitive award is within the range of awards

⁵¹ The arguments of several *amici* are similarly premised on this incorrect assertion.

given under similar circumstances.⁵² Second, that court itself applies the detailed substantive standards it has developed for evaluating punitive awards.⁵³

⁵² *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d at 1053 (reducing punitive award that had been upheld by trial court from \$3.5 million to \$500,000 after Supreme Court itself applied *Hammond* factors and made a comparative analysis). In *Land & Associates, Inc. v. Simmons*, 1989 Ala. Lexis No. 1048, at 28 (Ala. 1989), largely on the basis of a "comparative analysis with other awards in similar cases," the trial court ordered the plaintiff to remit \$1.9 million of a \$2.5 million punitive award, and the Alabama Supreme Court affirmed. Pacific Mutual argues that Alabama's punitive damages scheme is "arbitrary" by comparing the jury's award in *Land & Associates* with a smaller award in a similar case, without noting that precisely *because* of Alabama's new review standards and procedures, in *Land & Associates* the trial court reduced that jury award by more than 75%. Pet. Br. at 21.

⁵³ *Central Alabama Electric Co-op v. Tapley*, 546 So. 2d 371, 377-378 (Ala. 1989) (emphasis added). The availability of meaningful trial and appellate review under the *Hammond* standards and Alabama's comparability review sharply distinguishes Alabama's punitive damages system from the Mississippi and Vermont schemes about which some Justices expressed concern in *Bankers Life and Brouning-Ferris*. Jury discretion is much more limited in Alabama than it was in Mississippi or Vermont. The Mississippi scheme at issue in *Bankers Life*, described by Justice O'Connor as involving "wholly standardless discretion," *Bankers Life and Cas. Co. v. Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (O'Connor, J., concurring), entirely abdicated judicial review of jury awards. "Mississippi law gives juries discretion to award *any* amount of punitive damages," Justice O'Connor observed, and "[a]s the Mississippi Supreme Court said, 'the determination of the amount of punitive damages is a matter committed *solely* to the authority and discretion of the jury.'" *Bankers Life*, 108 S. Ct. at 1655, 1656 (emphasis added). Under the review standard used by Mississippi courts, an award would not be considered excessive unless "it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience." *Bankers Life and Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985) (citing earlier cases). As noted, that test is only the beginning of the inquiry in Alabama. Similarly, the Vermont scheme at issue in *Brouning-Ferris*, described by Justice Brennan as "little more than an admonition [to the jury] to do what they think best,"

In particular, the Alabama Supreme Court reviews punitive awards to ensure they do "not exceed an amount that will accomplish society's goals of punishment and deterrence."⁵⁴

Prior to its ruling in this case, that court had further elaborated the specific *Hammond* criteria for determining whether a punitive award is reasonably related to the goals of retribution and deterrence:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this

109 S. Ct. at 2923 (Brennan, J., concurring), provided far less structure than Alabama's system. The only instruction given to Vermont juries was that "[i]n determining the amount of punitive damages, you may take account of the character of the defendants, their financial standing, and the nature of their acts." *Id.* Under the review standard used by Vermont courts, an award would be set aside or modified only if it was "manifestly and grossly excessive." *Pezzano v. Bonneau*, 133 Vt. 88, 329 A.2d 659, 661 (Vt. 1974). Thus, even if the systems at issue in *Bankers Life* and *Browning-Ferris* would not have met due process requirements, Alabama's system does.

⁵⁴ *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989) (citations omitted); *Wilson v. Dukona Corp.*, N.V., 547 So. 2d 70, 73 (Ala. 1989). This is a rational and meaningful test. Indeed, it has been proposed by several of petitioner's supporting amici as the appropriate due process test for limiting jury discretion. *E.g.*, Brief Amicus Curiae of The Alliance of American Insurers, et al. (hereafter "Alliance Amicus Br."), at 6-7, 14, 15, 18 (awards that are rationally related to society's goals can satisfy due process even without legislative cap or legislative standards).

conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

(4) The financial position of the defendant would be relevant.

(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Green Oil, 539 So. 2d at 223-224; *Central Alabama*, 546 So. 2d at 371.

Application of these standards by the Alabama Supreme Court imposes a meaningful constraint on the discretion of juries awarding punitive damages.⁵⁵ Each of

⁵⁵ Applying the *Hammond* factors, trial and appellate courts have ordered reductions in awards or new trials even when those awards did not result from bias. For example, in *Green Oil*, after being ordered to conduct a *Hammond* review by the Alabama Supreme Court, the trial court reduced by almost 85% a punitive award it had previously upheld as appropriate. *Green Oil*, 539 So. 2d at 219. In *Wilson*, the Alabama Supreme Court reversed the trial court's approval of a punitive award and itself set aside the entire punitive award of a "properly functioning jury", because "under the facts of this case," punitive damages "would do nothing

these standards is directly and rationally related to determining whether a particular award is greater than is reasonably necessary to punish and deter. Indeed, each has been urged as an appropriate standard by one or more of Pacific Mutual's supporting *amici*. In fact, Alabama's standards are at least as specific as those proposed by so-called "tort reform" advocates, or adopted legislatively by a few States.⁵⁶

Post-verdict application of these standards to an award set pursuant to a traditional common law jury charge satisfies Due Process. This Court's capital punishment decisions make clear that appellate application of substantive standards for punishment satisfies even the greater demands of the Eighth Amendment. Both *Walton v. Arizona*, 1990 U.S. Lexis No. 3462 (1990) and *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990), expressly hold that where a jury has received an unconstitutionally vague charge, a state supreme court may constitutionally apply substantive standards and on that basis ratify or set aside the jury's otherwise flawed verdict. In *Clemons*, this Court concluded that such appellate review is not "at odds with contemporary standards of fairness or . . . inherently unreliable and likely to result in arbitrary" verdicts. *Id.* at 1493. It follows *a fortiori* that Due Process is satisfied by trial and appellate court application of constitutionally sufficient standards in civil cases, where life is not at stake.

to further society's goals of punishment and deterrence." 547 So. 2d at 74. The court applied two of the *Hammond* factors, noting that at the post-verdict *Hammond* hearing the defendants introduced "evidence" of their poverty, and noting that there had been "other civil actions" against the same defendants for the same conduct. *Id.*

⁵⁶ See, e.g., Federation of Insurance Counsel Reform Proposal, reprinted in J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* § 21.02, at 12 (1985) (amount of previous award in civil cases for same course of conduct); Ohio Rev. Code Ann. § 2307.80(B) (1988) (likelihood of serious harm; defendant's awareness; profitability; financial condition of defendant; concealment; other awards and criminal penalties); Montana Code § 27-1-221 (same).

In sum, Alabama's procedures for assessing punitive damages provide all the process that is due.⁵⁷ The jury's assessment must be based on the evidence, and is set at an amount reasonably calculated to achieve the State's goals of retribution and deterrence. The jury's judgment is then subjected to exacting substantive scrutiny to ensure that the award is not excessive in relation to the State's objectives. The trial and appellate courts carefully and rigorously apply the substantive standards articulated in *Hammond* and *Green Oil* and conduct a comparative analysis of other cases to ensure the verdict falls within a reasonable range.⁵⁸

⁵⁷ See *Mathews v. Eldridge*, 424 U.S. 319 (1976). This Court has not uniformly applied *Mathews* to evaluate procedural due process challenges to traditional state civil adjudicatory rules and procedures. E.g., *Burnham v. Superior Court*, *supra*. If applicable, *Mathews* in any event mandates a finding that Alabama's procedures provide due process. The State has a strong interest in preserving flexible decisionmaking. See pages 26-28 *supra*. The additional procedures demanded by Pacific Mutual would not measurably increase the accuracy of Alabama's approach. Unlike a specific judgment whether a conduct rule has been violated, there is no precise number that represents a correct punitive award. Rather, such awards can fall at different points within a range and remain reasonable. Alabama's post-trial and appellate review ensure punitive awards fall within a reasonable range.

⁵⁸ Post-verdict *Hammond* review by the trial courts and the Alabama Supreme Court has often resulted in remittitur of punitive awards. See *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1051 (Ala. 1987); *Reinhardt Motors, Inc. v. Boston*, 516 So. 2d 509, 514 (Ala. 1986); *Davison v. Mobile Infirmary*, 518 So. 2d 675, 682 (Ala. 1986); *Consolidated Freightways Inc., v. Pacheco-Rivera*, 524 So. 2d 346, 353 (Ala. 1988); *Harmon v. Motors Ins. Co.*, 525 So. 2d 411 (Ala. 1987); *North Carolina Mut. Life Ins. Co. v. Holley*, 533 So. 2d 497, 507 (Ala. 1987); *State Farm Mut. Auto Ins. Co. v. Robbins*, 541 So. 2d 477, 478 (Ala. 1989); *United Services Auto Ass'n v. Wade*, 544 So. 2d 906, 917 (Ala. 1989); *Wilson v. Dukona Corp., N.V.*, 547 So. 2d 70, 74 (Ala. 1989); *Williams v. Ralph Collins Ford-Chrysler, Inc.*, 551 So. 2d 964, 965 (Ala. 1989); cf. *State Farm Fire & Cas. Ins. Co. v. Lynn*, 516 So. 2d 1373, 1377 (Ala. 1987).

4. *Pacific Mutual Was Not Denied Due Process.* Pacific Mutual had the benefit of the full panoply of Alabama's procedural protections. The jury was instructed that the amount of any punitive award should be based on the evidence and should be necessary to achieve the goals of retribution and deterrence. The trial court conducted a post-verdict hearing in conformity with the dictates of *Hammond*. Although Pacific Mutual was free to submit evidence at the hearing—including evidence of the financial impact of the jury's punitive award—it chose not to do so. The trial court's statement of reasons made clear that the substantive criteria set forth in *Hammond* were applied. Pet. App. A 14. In particular, the trial court found the conduct at issue to be "malicious, gross and oppressive." *Id.* The trial court also found the punitive award reasonable in light of the importance of encouraging insurance companies to prevent similar conduct by their employees in the future. Pet. App. A 15. And the trial court found the four separate awards were "in proportion to the damage done each plaintiff," *id.*; the only substantial award was rendered in the case of respondent Haslip, who was the most seriously harmed.⁵⁹

Pacific Mutual also received the benefit of review by the Alabama Supreme Court. That court specifically approved the verdict under the *Hammond* standards, and cited with approval the reasoning of the trial court, which examined the relation of the punitive award to the harm caused, the degree of reprehensibility, and the need to deter such conduct in the future. Pet. App. B 13; see *id.* at A 14-15. Although the Alabama Supreme Court

(remittitur of compensatory damage award); *Auburn Ford, Lincoln Mercury, Inc. v. Noirel*, 541 So. 2d 1077, 1080 (Ala. 1989) (same).

⁵⁹ As noted at page 43 *infra*, the general verdict, rendered in this case without objection from Pacific Mutual, does not reveal what if any portion of any of the awards is punitive.

did not explicitly cite *Green Oil* and *Central Alabama*, those decisions had been rendered only months before the decision in this case, and the court would not have affirmed this award if it were inconsistent with the additional standards set forth in those decisions. See *Walton v. Arizona*, 1990 U.S. Lexis No. 3462, at 3 ("judges are presumed to know the law and apply it in making their decisions"). In any event, the Alabama Supreme Court brought to bear all relevant factors recited in *Green Oil*: of the new factors mentioned in *Green Oil*, Pacific Mutual understandably chose not to make its financial position an issue; no criminal sanctions had been imposed for this conduct; nor had any prior punitive awards been imposed. Accordingly, the *Green Oil* refinements of the *Hammond* standards were either applied in this case or on the facts did not even arguably support Pacific Mutual's claim of excessiveness.⁶⁰

Application of constitutionally sufficient criteria by the Alabama courts conclusively disposes of Pacific Mutual's

⁶⁰ The first four *Green Oil* factors are merely more elaborate statements of the factors set forth in *Hammond* itself (the culpability of the defendant, the desirability of discouraging others from similar conduct, the impact on the parties, and the impact on innocent third parties). 493 So. 2d at 1379. The Alabama Supreme Court's citation of *Hammond* proves these factors were applied. Pacific Mutual has never argued that this award is excessive under the fourth, fifth, sixth or seventh *Green Oil* factors. Thus, the only factors relevant to the facts of this case are culpability and deterrence, both of which were specified in *Hammond*. It would have been ludicrous for Pacific Mutual to argue that this award was economically destructive. The total award is less than two tenths of one percent of Pacific Mutual's net cash from operations (\$645,595,821) for 1986, the year prior to trial, and less than two one-hundredths of one percent of Pacific Mutual's total assets (\$6,981,385,797) on December 31, 1986. Annual Statement of Pacific Mutual Life Insurance Company to the Insurance Department of the District of Columbia for the Year Ended December 31, 1987, Life Accident and Health, at 2, 4a (reporting both 1986 and 1987 figures).

claims. This Court's recent Eighth Amendment decisions make clear that "if a State has adopted a constitutionally narrow construction of a facially vague [standard], and if the State has applied that construction to the facts of the particular case," then the Constitution is fully satisfied, even if this Court would apply the standards differently. *Lewis v. Jeffers*, 1990 U.S. Lexis No. 3463 (1990) (slip op. at 14). This Court does not examine whether the standards have been correctly applied in the particular case, because that is a question of the proper application of state law. *Id.* This reasoning applies fully in the present context. Alabama has articulated a narrowed construction of its standards for assessing punitive damages, and has applied those standards in this case. Accordingly, Pacific Mutual's due process challenge must be rejected.

C. Pacific Mutual's Vagueness Challenge Ignores The Crucial Constitutional Distinction Between Rules Governing Conduct And Standards For Deciding What Consequences Should Flow From Violations Of Those Rules.

Pacific Mutual's "void-for-vagueness" argument is also meritless. As demonstrated, Alabama's jury instructions, post-verdict review and appellate scrutiny each independently provide well-defined substantive standards for guiding and constraining the assessment of punitive damages. These standards provide far more than the "minimal guidelines" the "void-for-vagueness" doctrine requires. See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

Even assuming *arguendo* the void-for-vagueness doctrine applies to common law civil adjudication between private parties,⁶¹ the decisions on which Pacific Mutual

⁶¹ Decisions by this Court applying the doctrine typically involve statutes or regulations enforced by government against private citizens. See, e.g., *Kolender*, 461 U.S. at 357 ("void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness" (emphasis added)). The concerns that

relies are inapposite because they involved laws regulating constitutionally protected activity. See, e.g., *Kolender*, 461 U.S. at 358 ("First Amendment liberties" and "constitutional right to freedom of movement"); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (First Amendment rights).⁶² When constitutionally protected activity is implicated, statutes must be sufficiently clear to ensure that protected activity is not chilled. When—as here—state laws merely regulate economic activity and pose no risk of chilling protected activity, "a less strict vagueness test" applies. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Alabama's punitive damages law easily meets the test for economic regulations.

Moreover, Pacific Mutual's argument ignores a crucial distinction between laws regulating conduct and standards governing the consequences that flow from violation of those laws. The Due Process Clause requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357 (emphasis added). Every decision by this Court applying the void-for-vagueness doctrine has involved a law purporting to proscribe particular conduct.

Pacific Mutual cannot claim that Alabama's prohibition of intentional fraud is ambiguous or uncertain in

make the doctrine appropriate in that context are greatly diminished in cases between private litigants. The risk of arbitrary and discriminatory enforcement of the law by police and prosecutors simply is not present. Cf. *Browning-Ferris*, 109 S. Ct. 2909 (1989).

⁶² Because of the different purpose of, and interests protected by, the First Amendment, any damages designed to deter future speech might violate that Amendment, but the issue is not raised here.

any way. Pacific Mutual argues, however, that it was entitled to advance notice of the precise punitive consequences that would be imposed upon it for intentional fraud. This interest is not protected by the "void-for-vagueness" doctrine. Citizens do not need to know what consequences will follow from violating a law in order to conform their behavior to that law. They need only know what "conduct is prohibited." *Kolender*, 461 U.S. at 357 (emphasis added). Advance knowledge of what consequences will result from deliberate violations could be relevant only to calculating the costs and benefits of intentionally breaking the law. This "interest" is hardly one of constitutional magnitude.

Nor is the constitutional concern about discriminatory enforcement implicated. As this Court has repeatedly made clear, vague conduct rules deny due process primarily because they "entrust lawmaking to the moment-to-moment judgment of the policeman on his beat," *Smith v. Goguen*, 415 U.S. 566, 575 (1975) (quotation deleted), and "confer[] on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring in the judgment). This risk of governmental overreaching is not present here because the litigation involves private parties, and the proscription of fraud was clear and left no lawmaking authority to the jury or the reviewing court.

This Court's decision in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), is not to the contrary. Like every other void-for-vagueness case, *Giaccio* struck down a law governing conduct. The Pennsylvania law at issue—which permitted juries in criminal cases to assess court costs against acquitted defendants who had engaged in "reprehensible" conduct—left "jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Id.* at 402-403. The case did not involve jury discretion to fix the amount of costs.

The challenge was directed at the vagueness of the standard of conduct subjecting defendants to *any* liability.

Standards for determining the consequences of violating the law have never been subjected to "void-for-vagueness" analysis. To the contrary, this Court has recognized that States are generally "free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion). Many state criminal statutes thus permit a sentence of "any term of years" for certain crimes.⁶³ Decisions about appropriate consequences are "significantly different" than decisions whether a violation has occurred. In assessing consequences to be imposed, the decisionmaker "does not attempt to decide whether particular elements have been proved," but instead weighs "countless facts and circumstances" that cannot be prescribed in advance. *See Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in the judgment). States have a substantial interest in preserving the flexibility essential to these "difficult and uniquely human judgments that defy codification and that 'build discretion, equity and flexibility into a legal system.'" *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (quotation omitted). For this reason, courts have consistently rejected due process challenges even to criminal sentencing schemes that vest broad discretion in the decisionmaker to fix an appropriate sentence.⁶⁴

⁶³ *E.g.*, Mich. Code § 750.317; Va. Code § 18.2-58; D.C. Code § 22-2801; *see also* Texas Crim. Code § 12.32 (Term of 5 to 99 years for any first degree felony). *See Stevens v. Armontrout*, 787 F.2d 1282, 1284 (8th Cir. 1986) (affirming 200 year sentence under statute permitting sentence of any term of years).

⁶⁴ *See, e.g., United States v. Wivell*, 893 F.2d 156, 160 (8th Cir. 1990) ("It is well-established that, with the exception of capital cases, there is no constitutional right to [sentencing guidelines]. Indeed, a defendant's due process rights are unimpaired by the complete absence of such guidelines"); *United States v. Davis*, 801 F.2d 754, 756-757 (5th Cir. 1986); *R.G. Britton v. Rogers*,

III. THE SIZE OF THIS AWARD DOES NOT VIOLATE ANY *SUBSTANTIVE* REQUIREMENT OF DUE PROCESS BECAUSE IT IS RATIONALLY RELATED TO ALABAMA'S GOALS OF DETERRENCE AND RETRIBUTION, AND THUS CANNOT BE FOUND "WHOLLY ARBITRARY AND UNREASONABLE."

Pacific Mutual and supporting *amici* also raise a *substantive* due process challenge to the "amount" of this award.⁶⁵ Pacific Mutual does not describe the nature of the applicable test, but its supporting *amici* candidly acknowledge that "[a]s in other areas of substantive due process, the governing constitutional standard is one of rationality." They further concede: "So long as an award of punitive damages is 'no more' than is 'reasonably calculated' to serve the purposes of deterrence and punishment, it will pass muster under the Due Process Clause."⁶⁶ Under that standard, the awards in this case were plainly constitutional.

The argument that these awards are grossly excessive begins with the erroneous factual premise that the total punitive component of these awards exceeds \$1 million.⁶⁷

631 F.2d 572, 578-581 (8th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981); *Vines v. Muncy*, 553 F.2d 342, 347-348 (4th Cir.), *cert. denied*, 434 U.S. 851 (1977); *Smith v. Follette*, 445 F.2d 955, 960-961 (2d Cir. 1971); *United States v. Baker*, 429 F.2d 1344, 1346-1347 (7th Cir. 1970); *Sero v. Oswald*, 351 F. Supp. 522, 530 (S.D.N.Y. 1972); *Rogers v. State*, 265 Ark. 945, 582 S.W.2d 7, 13-14 (Ark. 1979) (*en banc*).

⁶⁵ Pet. Br. at 32-35. Pacific Mutual is understandably reluctant to characterize this as a substantive due process challenge, but the briefs of supporting *amici* candidly acknowledge that it is. *E.g.*, Alliance Amicus Br. at 5-24; Brief Amicus Curiae for The Business Roundtable, *et al.* (hereafter "Business Roundtable Amicus Br.") at 2-10.

⁶⁶ Business Roundtable Amicus Br. at 8, 9; *See also* Alliance Amicus Br. at 6-7, 11-12, 14, 15, and 17-19.

⁶⁷ *E.g.*, Alliance Amicus Br. at 24 (assuming punitive component is over \$1 million).

Because Pacific Mutual did not request special verdicts, as it had a right to do, *American Pioneer Life Ins. Co. v. Sandlin*, 470 So. 2d 657, 668-69 (Ala. 1985), the jury gave only general verdicts for each of the four respondents. In these circumstances, Alabama law presumes that the compensatory portion is "as much as could possibly be allowed for compensation," and the defendant bears the burden of showing how much of each general verdict is punitive; Alabama courts then review the "remaining portion" to determine whether the punitive components would "exceed an amount necessary to accomplish society's goal of adequately punishing and deterring."⁶⁸

In closing argument, counsel for respondents requested \$10,000 as compensatory damages for respondent Hargrove, who received a total award of \$10,288. RT at 815, 920. Accordingly, Hargrove's punitive award was, at most, \$10,288. A similar analysis applies for respondents Craig and Calhoun, who each requested \$10,000 in compensatory damages and received, respectively, total awards of \$12,400 and \$15,290. RT 814, 920-921. These were separate general verdicts and their constitutionality must be evaluated separately. It is impossible to argue that the punitive components of the awards to respondents Hargrove, Craig and Calhoun are constitutionally excessive, and Pacific Mutual has not seriously tried.

Respondent Haslip requested compensatory damages of \$200,000 and received a total award of \$1,040,000. RT 812, 921-922.⁶⁹ Applying Alabama law, the punitive component of Mrs. Haslip's award was, *at most*, \$840,000 (which is just over four times the compensatory component). That amount is well within any conceivable

⁶⁸ *McDowell v. Key*, 557 So. 2d 1243, 1249 (Ala. 1990).

⁶⁹ Pacific Mutual effectively concedes that the jury awarded at least \$200,000 in compensatory damages to respondent Haslip. Pet. Br. at 32, 35.

substantive limits of the Due Process Clause, as we will now show.

Neither this nor any other court has ever found a punitive damage award excessive as a matter of substantive due process. Indeed, Pacific Mutual and its supporting *amici* have been able to find only two cases, both from the heyday of economic substantive due process, in which this Court found *other* types of awards excessive.⁷⁰ Neither involved a punitive damage award, and neither remotely suggests that the award at issue here is excessive.⁷¹ In all of the other cases cited by Pacific Mutual and its supporting *amici*, the Court upheld the amount at issue.⁷²

⁷⁰ *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340 (1913); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915).

⁷¹ Both involved statutory civil fines imposed on common carriers. *Tucker* held that a \$500 fine violated due process because it threatened to "intimidate" common carriers from "resorting to courts to test the validity" of statutory maximum rates; the only way to challenge the rate ceiling was to charge an excessive rate and face the consequences. 230 U.S. at 347, 349-350. *Southwestern Tel.* held that a \$100-per-day fine violated due process because it was imposed despite a complete absence of notice that the conduct giving rise to the fine was unlawful. 238 U.S. at 489. A case less far afield, *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), is not even cited by Pacific Mutual. There, the Court upheld a rate violation penalty against a common carrier who *did* have an opportunity to challenge the underlying rate. The penalty was 113 times the plaintiff's actual loss. The Court rejected the argument that the penalty had to be "confined or proportioned to . . . loss for damages," *id.* at 66, and upheld the penalty because it was not "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." 251 U.S. at 67. As this ruling makes clear, it is neither necessary nor appropriate to require a fixed ratio between compensatory and punitive damages. In cases where the harm to an individual plaintiff is slight, but there exists a risk that the defendant will inflict that harm upon a wide number of others, effective deterrence will require a punitive award substantially in excess of compensatory damages.

⁷² *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909) (upholding \$1.6 million "penalty" and cancellation of company's license to do

Confronted with these authorities, Pacific Mutual understandably urges adoption of the more rigorous review standards announced in *Solem v. Helm*, 463 U.S. 277 (1983), for judging sentences of life without parole under the Cruel and Unusual Punishments Clause. There is no warrant for doing so. Heightened substantive scrutiny of punitive damage awards is no more authorized under the Due Process Clause than it is under the Excessive Fines Clause. *Browning-Ferris*, 109 S. Ct. at 2914.⁷³

In a further effort to obtain heightened due process scrutiny, Pacific Mutual argues that whether a punitive damage award is constitutionally excessive should be judged by comparison to analogous *criminal fines*. Pet. Br. at 34-35. No court has so held. Furthermore, there are many reasons why Alabama could rationally decide to authorize punitive awards that are larger than criminal fines. First, the fine is only one component of the criminal punishment, and usually the least significant. As Justice O'Connor noted in *Browning-Ferris*, when discussing the Eighth Amendment, any comparison between punitive awards and criminal fines would have to "consider not only the possible monetary sanctions, but also any possible prison term." 109 S. Ct. at 2934 (O'Connor, J., concurring in part and dissenting in part). Second, in many States, including Alabama, an insurance company convicted of criminal conduct can lose its license to do business.⁷⁴ The comparison should therefore include the value

business); *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512 (1885) (upholding double damages penalty noting—apparently as proof of rationality of the penalty—that double, treble "and even quadruple the actual damages" were available in other States); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26 (1889) (same).

⁷³ Indeed, *Solem* repeatedly cautioned that the absence of any parole was critical to its ruling. 463 U.S. at 300-303, and nn. 31, 32.

⁷⁴ Ala. Ins. Code §§ 27-3-21(a); 27-3-21(b)(1) (Michie ed. 1989 Supp.).

to the company of its continued right to do business.⁷⁵ Third, the punitive damages system is intended to *supplement* the criminal law system, not to copy it. Criminal fines are set with full knowledge that punitive damages exist as a parallel enforcement system. Legislators could rationally decide to allow juries, and trial and appellate courts to assess punitive awards larger than criminal fines if warranted by the facts and circumstances of particular cases.

Finally, Pacific Mutual has not shown good cause for this Court to intrude further on state sovereignty by applying a *heightened* standard of substantive due process review to public welfare and economic regulation by the States. Because every application of substantive due process is a limitation on state power, the test for its application has always shown maximum deference to state sovereignty. Certainly Alabama could rationally decide, as it has, that punitive awards totalling at most, \$847,978 do not exceed an amount reasonably necessary to punish and deter the fraudulent conduct proved here. That should end any conceivable substantive due process inquiry.

IV. PETITIONER'S OTHER ARGUMENTS LACK MERIT.

A. Due Process Does Not Require The Full Panoply of Protections Available To Criminal Defendants In A Civil Punitive Damages Proceeding.

This Court's decision last term in *Browning-Ferris*—that punitive damages are not sufficiently criminal in nature to require application of the Excessive Fines Clause—refutes Pacific Mutual's theory that civil puni-

⁷⁵ "In identifying the relevant civil penalties [under the Eighth Amendment], the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions." *Browning-Ferris*, 109 S. Ct. at 2934 (O'Connor, J., concurring in part and dissenting in part).

tive damage proceedings require the constitutional protections applicable in criminal proceedings. Lower courts have uniformly rejected similar contentions.⁷⁶

Pacific Mutual nonetheless argues that punitive damage proceedings require proof beyond a reasonable doubt, a predetermined cap on the amount of damages, and bifurcation of the liability and penalty portions of the proceeding. These contentions have no merit.⁷⁷

⁷⁶ *Miller v. Cudahy*, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983); *Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1397 (D.N.J. 1990); *Ah You Man v. Raymark Indus.*, 728 F. Supp. 1461 (D. Hawaii 1989); *McCutchen v. Liberty Mutual Ins. Co.*, 699 F. Supp. 701 (N.D. Ind. 1988); *Gogol v. Johns-Manville Sales Corp.*, 595 F. Supp. 971 (D.N.J. 1984); *Olson v. Walker*, 162 Ariz. 174, 781 P.2d 1015 (Ariz. App. 1989); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987); *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 712 P.2d 1199 (Kan. 1986); *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 493 A.2d 1337 (1985); *Unified School Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 345, 629 P.2d 196 (1981); *see also Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *Peterson v. Superior Court*, 31 Cal. 3d 147, 181 Cal. Rptr. 784 (Cal. 1982); *People v. Superior Court*, 12 Cal. 3d 421, 115 Cal. Rptr. 812 (Cal. 1974); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); *Gibson v. Gibson*, 15 Cal. App. 3d 943, 93 Cal. Rptr. 617 (1971); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (Cal. 1967).

⁷⁷ Pacific Mutual's *Ex Post Facto* argument likewise has no merit. First, the very essence of an *ex post facto* challenge is that there must be some *change* in the law that punishes conduct that was previously considered innocent. *Weaver v. Graham*, 450 U.S. 24, 31 (1981); *Collins v. Youngblood*, 58 U.S.L.W. 4855, 4856 (1990). Alabama has imposed vicarious punitive liability for years. *See note 30 supra*. Similarly the alleged unpredictability of punitive awards raises concerns appropriately analyzed under the Due Process Clause, and, as demonstrated, Pacific Mutual was not denied due process.

Second, a civil case—even one imposing a civil penalty by the government—does not implicate *ex post facto* prohibitions unless the law is "so punitive" as to be criminal "either in purpose or

First, Pacific Mutual was not entitled to a "beyond a reasonable doubt" standard of proof, because the full panoply of protections available to criminal defendants simply are not required in a civil proceeding between private litigants. The criminal standard of proof is not constitutionally required where the government is not a party and the stigma of a criminal prosecution is absent. In any event, the criminal standard of proof was met in this case. The Alabama Supreme Court found that another instruction, not at issue here, was erroneous, but the error was harmless because the evidence of intentional fraud was "inescapable." Pet. App. B 6 (quoting Tr. Ct. finding, *id.* at A 14).⁷⁸

Second, Pacific Mutual plainly is not entitled to bifurcation. Pacific Mutual waived any such right under Alabama law by failing to request bifurcation at trial.⁷⁹ Accordingly, this Court should not reach that issue.⁸⁰ Moreover, the only arguable justification for bifurcation—that the liability jury not be exposed to evidence of the defendant's wealth—is not at issue in this case

effect." *United States v. Ward*, 448 U.S. 242, 248-49 (1980). This Court's decision last term in *Browning-Ferris* precludes the argument that the imposition of punitive damages is criminal in nature.

⁷⁸ Pacific Mutual did not request a "clear and convincing" standard of proof, either below or here. Therefore, this Court should not reach that question. *Bankers Life*, 108 S. Ct. at 1649; *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969). In any event, this Court has required a heightened standard of proof in civil proceedings—as a matter of due process—only where substantial personal liberty or privacy interests are at stake. See, e.g., *Santosky v. Kramer*, 455 U.S. at 764-65 (parental rights termination proceeding). And even if such a standard were required, the trial court's ruling makes clear it was met.

⁷⁹ *Central Alabama*, 546 So. 2d at 375 (refusing to review due process argument raised on appeal that punitive damage trials must be bifurcated because appellant "made no motion to bifurcate the trial").

⁸⁰ See note 78 *supra*.

because Alabama does not permit evidence of wealth to reach the jury.

Third, Pacific Mutual has cited no authority for its claim that procedural due process requires a predetermined cap on the amount of punitive damages that may be awarded. The Court has rejected that claim before. See *Standard Oil Co. v. Missouri*, *supra*. Furthermore, Pacific Mutual cannot belatedly assert this claim, which was not raised below or in its petition for certiorari. *Browning-Ferris*, 109 S.Ct. at 2921.

B. Pacific Mutual's Equal Protection Claim Has No Merit.

Pacific Mutual has substituted for its initial equal protection claim a new and different claim. Compare Cert. Pet. at 26-26 with Pet. Br. at 40-41. Its initial equal protection theory, therefore, has been abandoned because of Pacific Mutual's failure to brief the claim. Because certiorari was not granted on the substituted claim, neither equal protection claim is properly before this Court. *Browning-Ferris*, 109 S. Ct. at 2921.

In any event, the Equal Protection Clause is not violated when separate juries arrive at different punitive damage awards for different defendants based on different factual situations. Absent exact identity in two different cases, there is no merit to the argument that differing verdicts lack a rational basis—which is all that Equal Protection requires in this context. Moreover, Pacific Mutual has failed to point to any other particular jury verdict, based on similar facts, that renders this punitive damage award a violation of equal protection.

CONCLUSION

The judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

ROBERT H. ADAMS
NAJJAR, DENABURG, MEYERSON,
ZARZUR, MAX, WRIGHT
& SCHWARTZ, P.C.
2125 Morris Avenue
Birmingham, Alabama 35203
(205) 328-5760

ANDREW T. CITRIN
CUNNINGHAM, BOUNDS, YANCE,
CROWDER & BROWN
P.O. Box 66705
Mobile, Alabama 36660
(205) 471-6191

BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
THERESA A. CHMARA
CYNTHIA A. MISICKA
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400

CHARLES E. SHARP
JOHN F. WHITAKER
SADLER, SULLIVAN, HERRING
& SHARP, P.C.
2500 Southtrust Tower
Birmingham, Alabama 35203
(205) 326-4166

Attorneys for Respondents

* Counsel of Record

July 16, 1990

(39)
No. 89-1279

Supreme Court, U.S.
FILED

AUG 16 1989

JOSEPH F. SPANGLER, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITIONER'S REPLY BRIEF

Of Counsel:

VICKI W.W. LAI

ADAMS DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

BRUCE A. BECKMAN

Counsel of Record

ADAMS DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

OLLIE L. BLAN, Jr.

BERT S. NETTLES

SPAIN, GILLON, GROOMS,

BLAN & NETTLES

2117 Second Avenue North

Birmingham, Alabama 35203

(205) 328-4100

J. MARK HART

SPAIN, GILLON, GROOMS,

BLAN & NETTLES

2117 Second Avenue North

Birmingham, Alabama 35203

(205) 328-4100

Attorneys for Petitioner
Pacific Mutual Life Insurance Company

No. 89-1279

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITIONER'S REPLY BRIEF

Of Counsel:

VICKI W.W. LAI

ADAMS DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

BRUCE A. BECKMAN

Counsel of Record

ADAMS DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

OLLIE L. BLAN, Jr.

BERT S. NETTLES

SPAIN, GILLON, GROOMS,
BLAN & NETTLES
2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

J. MARK HART

SPAIN, GILLON, GROOMS,

BLAN & NETTLES
2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

Attorneys for Petitioner
Pacific Mutual Life Insurance Company

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	iv
ARGUMENT.	1
A. The Due Process Clause Of The Fourteenth Amendment Requires That The Appropriate Governmental Authority Define Punishable Conduct And Set The Permissible Range Of Punishment To Be Imposed By	1
1. Due Process Requires More Than Notice, Hearing And A Neutral Decisionmaker. It Also Requires Procedures Which Do Not Give Arbitrary Power To Juries Or Courts To Punish Selectively And To Determine The Limits Of Punishment After The Fact	1
2. The Historical Acquiescence By Courts In Granting Standardless Discretion To Juries To Impose Punishment Through Punitive Damages Awards Does Not Insulate The Practice From Constitutional Review.	2

	Page
3. Alabama Law, And The Jury Instruction Below Which It Authorized, Conferred Arbitrary, Discretionary Power On The Jury To Determine Punishment In Violation Of Pacific Mutual's Rights Under The Due Process Clause	7
4. Post-Trial Review By The Trial Judge And Appellate Court Did Not Cure The Due Process Defects At The Trial Stage Of The Proceedings Below.	10
5. The Requirements Of Fundamental Fairness And Notice Included In The Due Process Clause Apply To The Amount Of Punishment As Well As Fair Notice Of Prohibited Conduct.	13
B. The Award Of Punitive Damages Against Pacific Mutual For The Fraud Of Mr. Ruffin Acting With Respect To The Medical Insurance Policy Of Another Company, And Against The Interests Of Pacific Mutual, Violated Due Process.	14
C. Additional Trial Safeguards Are Required By Due Process In Punitive Damages Cases	17

	Page
D. The Award Herein Was Excessive In Violation Of Pacific Mutual's Due Process Rights	18
CONCLUSION.	19
APPENDIX A	
PARTIAL LIST OF ALABAMA JURY VERDICTS AWARDING PUNITIVE DAMAGES OF \$500,000 OR MORE.	A1
APPENDIX B	
PACIFIC MUTUAL'S LAPSED POLICY NOTICES	B1

TABLE OF AUTHORITIES

Cases	Page
Abel v. Conover 170 Neb. 926, 104 N.W.2d 684 (1960)	6
American Society Of Mechanical Engineers v. Hydrolevel Corp. 456 U.S. 556 (1982)	14, 15
Baggett v. Bullitt 377 U.S. 360 (1964)	11
Breaux v. Simon 235 La. 453, 104 So.2d 168 (1958), Trans. 112 So.2d 121 (La. Ct. App. 1959)	6
Brown v. Swineford 44 Wis. 282 (1877)	5
Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc. 109 S.Ct. 2909 (1989)	8
Bruton v. Leavitt Stores Corp. 87 N.H. 304, 179 A. 185 (1935)	6
Burt v. Advertiser Newspaper Co. 154 Mass. 238, 28 N.E. 1 (1891).	6
Calder v. Bull 3 U.S. (3 Dall.) 386 (1798).	13
Charter Hospital of Mobile, Inc. v. Weinberg 558 So.2d 909, 1990 Ala. Lexis 17 (1990)	8, 11

	Page
City of Lowell v. Massachusetts Bonding Co. 313 Mass. 257, 47 N.E.2d 265 (1943)	6
Collens v. New Canaan Water Co. 155 Conn. 477, 234 A.2d 825 (1967).	6
Detroit Daily Post Co. v. McArthur 16 Mich. 447 (1868)	5
Eichenseer v. Reserve Life Ins. Co. 894 F.2d 1414 (5th Cir. 1990)	17
Farley v. Engelken 241 Kan. 663, 740 P.2d 1058 (Kan. 1987).	7
Fay v. Parker 53 N.H. 342 (1873)	5
Fein v. Permanente Med. Group 38 Cal.3d 137, 695 P.2d 665 (Cal. 1985)	7
Giaccio v. Pennsylvania 382 U.S. 399 (1966)	2, 8, 13
Glissman v. Rutt 175 Ind. App. 493, 372 N.E.2d 1188 (1978)	6
Green Oil Co. v. Hornsby 539 So.2d 218 (Ala. 1989).	10
Hammond v. City of Gadsden 493 So.2d 1374 (Ala. 1986)	10-12, 19

	Page
Hanna v. Sweeney 78 Conn. 492, 62 A. 785 (1906)	6
Hibschman Pontiac, Inc. v. Batchelor 266 Ind. 310, 362 N.E.2d 845 (1977)	6
Jones v. State Bd. Of Medicine 97 Idaho 859, 555 P.2d 399 (1976).	6
Kenyon v. Hammer 142 Ariz. 69, 688 P.2d 961 (Ariz. 1984)	6
Land & Associates, Inc. v. Simmons 562 So.2d 140 (Ala. 1989).	12
Larson v. Lindahl 167 Colo. 409, 450 P.2d 77 (1968).	6
Lassiter v. Dept. of Social Services 452 U.S. 18 (1981).	2
Louis Pizitz Dry Goods v. Yeldell 274 U.S. 112 (1927)	14
Lucas v. U.S. 757 S.W.2d 687 (Tex. 1988).	7
McBride v. General Motors Corp. 737 F. Supp. 1563 (D. Ga. 1990).	6
McCoy v. Arkansas Natural Gas Co. 175 La. 487, 143 So. 383 (1932), <i>cert den.</i> , 287 U.S. 661 (1932).	6
Michigan C.R. Co. v. Vree and 227 U.S. 59 (1913).	19

	Page
Miller v. Florida 482 U.S. 423 (1987)	2, 13
Miller v. Kingsley 194 Neb. 123, 230 N.W.2d 472 (1979).	6
Murphy v. Hobbs 7 Colo. 541, 5 P. 119 (1885).	5
National Life Ins. Co. v. Reedy 115 So.2d 8 (Ala. 1927)	15
New York Central and Hudson River R.R. Co. v. United States 212 U.S. 481 (1909)	16
Nicholson's Mobile Home Sales, Inc. v. Schramm 164 Ind. App. 598, 330 N.E.2d 785 (1975).	6
Pfost v. State 219 Mont. 206, 713 P.2d 495 (Mont. 1985).	7
Richardson v. Carnegie Library Restaurant 763 P.2d 1153 (1988)	7
Roberts v. United States Jaycees 468 U.S. 609 (1984)	11
Roginsky v. Richardson-Merrell, Inc. 378 F.2d 832 (2d Cir. 1967)	5
Rookes v. Barnard (1964) A.C. 1129, 1 All Eng. Rep. 367	6

	Page
Rosener v. Sears, Roebuck & Co. 110 Cal.App.3d 740 (1980)	4
Rummel v. Estelle 445 U.S. 263 (1980)	11
Schall v. Martin 467 U.S. 253 (1984)	8
Sofie v. Fibreboard Corp. 112 Wash. 636, 771 P.2d 711 (Wash. 1989)	7
Solem v. Helm 463 U.S. 277 (1983)	18-20
Spokane Truck & Dray Co. v. Hoefer 2 Wash. 45, 25 P. 1072 (1891)	6
Standard v. Bolin 88 Wash.2d 614, 565 P.2d 94 (1977)	6
Standard Oil Co. of Indiana v. Missouri 224 U.S. 270 (1912)	9
Stevens v. Armontrout 787 F.2d 1282 (8th Cir. 1986)	9
Travelers Indemnity Co. v. Armstrong 442 N.E.2d 349 (Ind.S.Ct. 1982)	17
Union City Barge Line, Inc. v. Union Carbide Co. 823 F.2d 129 (5th Cir. 1987)	15
United States Automobile Association v. Wade 544 So.2d 906 (Ala. 1989)	12

	Page
United States v. Batchelder 442 U.S. 114 (1979)	2, 13
Williams v. Illinois 399 U.S. 235 (1970)	3
Wise v. Daniel 221 Mich. 229, 190 N.W. 746 (1922)	6

Constitution

United States Constitution Fourteenth Amendment	1, 12, 19, 20
--	---------------

Publications

Couch on Insurance 2d (Rev. Ed.) Section 31:125	15
Hippard, "The Unconstitutionality Of Criminal Liability Without Fault: An Argument For A Constitutional Doctrine Of Mens Rea," 10 Houston L.Rev. 1039 (1973).	16
Restatement Agency 2d Section 217C, Comment c.	15

PETITIONER'S REPLY BRIEF

Petitioner Pacific Mutual Life Insurance Company ("Pacific Mutual") respectfully submits its reply to Respondents' Brief as follows:

ARGUMENT

- A. The Due Process Clause Of The Fourteenth Amendment Requires That The Appropriate Governmental Authority Define Punishable Conduct And Set The Permissible Range Of Punishment To Be Imposed By Punitive Damages Prior To Commission By The Defendant Of The Conduct Determined To Be Punishable.**

Respondents have asserted a number of arguments for the Due Process viability of Alabama punitive damages law and the jury instruction in this case which that law authorized. While some of the propositions advanced by Respondents are correct statements of the law in the abstract, none support Respondents' position here.

- 1. Due Process Requires More Than Notice, Hearing And A Neutral Decisionmaker. It Also Requires Procedures Which Do Not Give Arbitrary Power To Juries Or Courts To Punish Selectively And To Determine The Limits Of Punishment After The Fact.**

Respondents suggest that Alabama punitive damages procedures are valid because they give notice, an opportunity to be heard, and a neutral decisionmaker [Resp. Br. 17-18].

Due Process, however, requires more. Arbitrary and discriminatory enforcement of laws, including the determina-

tion of punishment, violates Due Process [*United States v. Batchelder*, 442 U.S. 114, 123 (1979); *Miller v. Florida*, 482 U.S. 423, 429, 435-436 (1987); *Giaccio v. Pennsylvania*, 382 U.S. 399, 401-403 (1966)], and mandates fundamental fairness at the hands of the law for all defendants at all times in all circumstances [*Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24-25 (1981)].

It is this aspect of Due Process which is relevant to the Constitutional inquiry here. Pacific Mutual submits that the power given to the jury below¹ to determine whether or not, and how much, to punish based only upon the personal predilections and subjective reactions of the twelve individuals who happened, on this single occasion, to be empowered to determine the limits of punishment in this case, conferred such arbitrary power, and therefore violated Pacific Mutual's Due Process rights.

2. The Historical Acquiescence By Courts In Granting Standardless Discretion To Juries To Impose Punishment Through Punitive Damages Awards Does Not Insulate The Practice From Constitutional Review.

Respondents contend that because jury instructions substantially identical to that given below have been in use and upheld for 200 years, the Due Process compliance thereof is

¹ Respondents suggest that Pacific Mutual waived any right to raise Due Process Clause challenges to the jury instruction below, because no specific objection was made thereto, and no alternative instruction was submitted. However, in an unsuccessful motion for directed verdict [J.A. 37], Pacific Mutual's trial counsel challenged the constitutionality of Alabama procedures generally under a broad array of issues. This was deemed sufficient by the Alabama Supreme Court to preserve the issues, as shown by the fact that such court in fact considered the Constitutional issues raised before that court by Pacific Mutual, including the issue that Due Process requires an effective limit on the amount of punitive damages the jury may award.

established [Resp. Br. 20-21]. Respondents also contend that recent studies show that in fact there has been no increase in the frequency or size of punitive damages awards [Resp. Br. 23-24]. Respondents then contend that the matter should be left to state legislatures and courts to remedy [Resp. Br. 24].

Contrary to Respondents' position, the longevity of a doctrine does not establish its compliance with Constitutional requirements.

In *Williams v. Illinois*, 399 U.S. 235 (1970), in which the Court invalidated the time-honored practice of extending the prison term of convicted defendants beyond the stated maximum for their offenses when they were unable to pay fines and court costs, the Court stated, at pages 239-240:

"... [N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack. . . .

"The need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by the present case since the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country. . . ."

Here, while Respondents cite three studies for the proposition that there has been no increase in the frequency or size of punitive damages awards, such conclusion is contrary to common sense and simple observation. A review of the historical expansion of punitive damages awards in Alabama and California set forth in Appendix A to Petitioner's Brief, as updated in Appendix A-1 hereto, in Appendix E to Petitioner's Reply Brief to Respondents' Opposition to petition for writ of certiorari, and Appendices A and B to the *amicus curiae* brief herein of the Association For California Tort Reform, and a review of the analysis of punitive damages awards in the *amicus curiae* brief of the American Institute Of Architects, *et al.*, clearly demonstrates that

considerable change has occurred both in the frequency and amount of punitive damages awards.

Respondents' conclusion contrasts sharply with the observations of a California appellate justice on the judicial firing line while the transformation of punitive damages was taking place. In *Rosener v. Sears, Roebuck & Co.*, 110 Cal.App.3d 740 (1980), Justice Elkington filed a reluctant concurrence, expressing his observations on the changes in punitive damages law, as follows, at page 758:

"I am fearful that the law of punitive damages as it has developed in this state no longer serves any public policy, or the legitimate interests of the unentitled recipients of its constantly accelerating largess."

Further, at page 760:

"In California's history it had long been the rule that punitive damages were recoverable only where the defendant entertained 'the wrongful *personal intention* to injure' the plaintiff . . . and that the essential element of malice must be ' "*actual malice* [denoting] ill will on the part of the defendant, or his desire to do harm for the mere satisfaction of doing it" ' When properly awarded, punitive damages then had a modest relation to actual damages; 'the granting of them [was] done with the greatest of caution [and they were] only allowed in the clearest of cases.' . . .

"But notwithstanding those restrictive and cautionary dicta, the bases, and frequency, and measure, of punitive damages have expanded far beyond the original legislative and judicial intent and, in my respectful opinion, far beyond reason and sound public policy."

Justice Elkington then analyzed the expansion of the size of approved punitive damages awards, finding that prior to

1959, the highest ratio of punitive to actual damages upheld in a California reported decision was approximately twice the actual damages [*id.* at page 760]. He then noted at page 761 that the proportionate relationship has continued to escalate until an award of 190 to 1 has been upheld.

Justice Elkington observed [*id.* at page 761] that "the *circumstances* under which punitive damages may be awarded have been widely expanded," now being allowed in "tortious" breach of contract actions and in many negligence actions.

Justice Elkington then reported his observation of the great increase in the frequency of punitive damages awards as follows, at page 762:

"These and perhaps other reasons, I think, have brought about the present-day practice of seeking punitive damages in substantially all damage actions, and what will reasonably be termed the explosion of punitive damage awards. And such punitive damage awards are observed not to be generally confined to large corporations such as defendant Sears Roebuck & Company, or so-called 'wealthy' defendants. They are regularly returned also, against the 'average' defendants of damage actions."

Until about 1970, punitive damages were seldom sought and were infrequently awarded. Such awards were modest, and were imposed against intentional evil-doers. Even so, punitive damages doctrine has been controversial since virtually its inception. A number of courts have expressed doubt as to the propriety or validity of punitive damages,²

² *Fay v. Parker*, 53 N.H. 342, 382 (1873); *Murphy v. Hobbs*, 7 Colo. 541, 545, 5 P. 119, 122 (1885); *Brown v. Swineford*, 44 Wis. 282, 286-288 (1877); *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447, 453 (1868); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-841 (2d Cir. 1967).

while other courts rejected the doctrine entirely,³ and still other courts have severely limited the availability of punitive damages.⁴

It is submitted that Respondents' argument that validity is conferred on punitive damages by historical survival to date is not well-taken.

Similarly, Respondents' suggestion that this Court abstain from considering the matter and leave any solutions to the state legislatures and courts, is without merit. A strong trend appears to be emerging for state supreme courts to invalidate even the limited restraints which state legislatures have attempted to place on some punitive damages awards.⁵ A

³ *Hanna v. Sweeney*, 78 Conn. 492, 494, 62 A. 785 (1906); *Collens v. New Canaan Water Co.*, 155 Conn. 477, 488, 234 A.2d 825, 831-832 (1967). (Allows recovery only of compensatory damages, but includes expenses of litigation, less taxable costs); *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N.E. 1 (1891) (Holmes, J.); *City of Lowell v. Massachusetts Bonding Co.*, 313 Mass. 257, 269, 47 N.E.2d 265, 272 (1943); *Bruton v. Leavitt Stores Corp.*, 87 N.H. 304, 305, 179 A. 185, 186 (1935); *Larson v. Lindahl*, 167 Colo. 409, 411-412, 450 P.2d 77, 78 (1968); *Abel v. Conover*, 170 Neb. 926, 929, 104 N.W.2d 684, 688 (1960); *Miller v. Kingsley*, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1979); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 56, 25 P. 1072, 1073-1074 (1891); *Standard v. Bolin*, 88 Wash.2d 614, 621, 565 P.2d 94, 98 (1977); *Breaux v. Simon*, 235 La. 453, 459, 104 So.2d 168, 170 (1958), Trans. 112 So.2d 121, 123 (La. Ct. App. 1959); *McCoy v. Arkansas Natural Gas Co.*, 175 La. 487, 497, 143 So. 383, 385-386 (1932), cert. den., 287 U.S. 661 (1932).

⁴ *Rookes v. Barnard* [1964] A.C. 1129, 1220, 1223, 1 All Eng. Rep. 367, 410-411; *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746, 747 (1922); *Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977); *Nicholson's Mobile Home Sales, Inc. v. Schramm*, 164 Ind. App. 598, 606, 330 N.E.2d 785, 790-791 (1975). Criticized in *Glissman v. Rutt*, 175 Ind. App. 493, 495, 372 N.E.2d 1188, 1190 (1978).

⁵ Tort Reform Act overturned:

Arizona - *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (Ariz. 1984).

Georgia - *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (D. Ga. 1990).

Idaho - *Jones v. State Bd. Of Medicine*, 97 Idaho 859, 555 P.2d 309 (1976) [declined to decide on reconsideration, but intermediate scrutiny test (continued)]

decision by this Court would assist, not impede, state reforms. Also, Pacific Mutual is entitled to Due Process in this case.

3. Alabama Law, And The Jury Instruction Below Which It Authorized, Conferred Arbitrary, Discretionary Power On The Jury To Determine Punishment In Violation Of Pacific Mutual's Rights Under The Due Process Clause.

Respondents contend that the jury instruction below was valid under Due Process because it focused the jury's attention on the punishment purpose of the award, and advanced Alabama's interest in flexible, individualized punishment [Resp. Br. 25-27]. Respondents also contend that the unpredictable, unlimited nature of the awards furthers state objectives by preventing would be wrong-doers from predicting and internalizing the penalties for wrongdoing [Resp. Br. 26].

Rather than accommodating, as Respondents contend, Pacific Mutual's interest in rational and fair decisionmaking, and Alabama's interest in individualized deterrence and retribution, the jury instruction in this case was

(ftn. continued)
announced, and placed burden of defendants to show correlation between Act and availability of health care].

Kansas - *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (Kan. 1987);

New Mexico - *Richardson v. Carnegie Library Restaurant*, 763 P.2d 1153 (1988).

Montana - *Pfost v. State*, 219 Mont. 206, 713 P.2d 495 (Mont. 1985).

Texas - *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988).

Washington - *Sofie v. Fibreboard Corp.*, 112 Wash. 636, 771 P.2d 711 (Wash. 1989).

Upheld:

California - *Fein v. Permanente Med. Group*, 38 Cal.3d 137, 695 P.2d 665 (Cal. 1985) [app. dismissed, 474 U.S. 892].

"incomprehensibly vague and unintelligible" as a guide to jurors in determining the amount of punishment to impose.⁶ Alabama law allowed the particular twelve people sitting as the jury to determine punishment as they saw fit, with no other guide than to consider the "character and degree of the wrong" and the "need for deterring similar wrongs." As Justice Brennan noted in *Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989), at page 2923:

"Guidance like this is scarcely better than no guidance at all The point is . . . that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best."

While this Court has recognized the propriety of flexibility and discretion in sentencing, that recognition has been in the context of cases in which the punishable conduct was defined, and the range of permitted punishment fixed by statute. This was recognized by this Court in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), wherein the Court specifically stated that the holding in that case was not intended to call into question the practice of some states to allow juries to fix sentences within legislatively permitted ranges [382 U.S. at page 405 n. 8].

In *Schall v. Martin*, 467 U.S. 253 (1984), relied upon by Respondents, this Court upheld trial court discretion to order pretrial detention if it found a likelihood that the juvenile would commit a crime if not detained. There, the length of detention was limited to the amount of time which would elapse between the pretrial detention hearing and the trial. A

⁶ *Charter Hospital of Mobile, Inc. v. Weinberg*, 558 So.2d 909, 1990 Ala. Lexis 17 (Jan. 12, 1990), [Houston, J., concurring at 1990 Ala. Lexis 17, pages 20-23, and expressing his view of a substantially identical instruction].

determination of the likelihood that a defendant would commit a crime prior to his or her court appearance is different in kind from determining, as a matter of first instance, the punishment to be imposed for given conduct.

Respondents argue that in noncapital offense cases, states are free to give untrammelled discretion in sentencing to the judge or jury, citing statutes supposedly giving total discretion to fix sentences at "any number of years" [Resp. Br. 41].

However, the flexibility given in noncapital offense cases is discretion within the maximum sentence prescribed by the legislatures.

The states which authorize sentences for "any number of years" in fact set ranges of permitted punishment. For example, in *Stevens v. Armontrout*, 787 F.2d 1282 (8th Cir. 1986) relied upon by Respondents [Resp. Br. 41, n. 63], the statute provided that defendants convicted of first degree murder could be sentenced to death, and that a defendant convicted of second degree murder was subject to "imprisonment during his natural life, or for any number of years" not less than ten. The defendant's sentence was for 200 years, which the Court of Appeals found to be effectively a life sentence [787 F.2d at 1283-1284]. The Michigan, Virginia and District of Columbia statutes cited are similar to that in *Armontrout*.

Respondents' argument that states can give unfettered discretion to fix punishment is not supported by the authority they cite.⁷ Discretion and flexibility within a legislatively prescribed range of punishment is different in kind from the arbitrary power given to juries in Alabama and other states to determine the amount of punishment to be imposed by

⁷ In *Standard Oil Co. of Indiana v. Missouri*, 224 U.S. 270 (1912), relied upon by Respondents [Resp. Br. 22], this Court considered the antitrust fine in question to be punitive damages, and accepted the propriety of discretion to fix such awards, subject to review for excessiveness. The Constitutional validity of punitive damages was not before the Court.

punitive damages awards, in the total absence of any suggestion of a permitted range of punishment.

It is this absence of prior governmental action in Alabama to set the range of permitted punishment which invalidates the award against Pacific Mutual in this case. This absence was aggravated by the lack of any other guidance to the jury on how to determine whether Pacific Mutual merited punishment, and if so, how much.

Respondents' contention that the unlimited and unpredictable nature of punitive damages is justified by the asserted deterrent effect thereof, misses the point. Due Process requires that the range of permitted punishment be set in advance of conduct, not to allow potential offenders to perform a cost/benefit calculation, but rather, to protect citizens from arbitrary and discriminatory punishment.

It is submitted that the guidance given to the jury below was inadequate in violation of Pacific Mutual's Due Process rights.

4. Post-Trial Review By The Trial Judge And Appellate Court Did Not Cure The Due Process Defects At The Trial Stage Of The Proceedings Below.

Respondents contend that any invalidity in the proceeding below caused by conferring standardless discretion upon the jury to determine punishment was cured by post-trial review at the trial court and appellate levels [Resp. Br. 28-38], particularly in view of the *Hammond*⁸ procedures announced in Alabama to review punitive damages awards [*id.*].

⁸ *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986); *Green Oil Co. v. Hornby*, 539 So.2d 218 (Ala. 1989).

As pointed out in Petitioner's Brief at pages 41-46, the damage is done at the trial level, by the absence of standards and a prescribed range of permitted punishment. The *Hammond* standards amount only to a "gentle test of excessiveness" based upon the subjective, visceral reactions of each judge or justice [see *Rummel v. Estelle*, 445 U.S. 263, 275 (1980), Burger, C.J., dissenting].

Additionally, the unconstitutionality of a law, such as Alabama punitive damages law, cannot be cured by a procedure for review of decisions made thereunder [*Baggett v. Bullitt*, 377 U.S. 360, 373 (1964)]. Unless the jury standards are clear, no meaningful judicial review can be conducted to determine whether the standards were adhered to [See *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984)]. Review of jury determinations made with reference to guidance as "incomprehensible and unintelligible" as that given in Alabama, merely transfers discretion to the reviewing courts.

The situation in Alabama is worsened by the fact that review, even under *Hammond* standards, is still deferential, and presumes that the jury verdict was correct. Justice Houston of the Alabama Supreme Court noted that Alabama's interpretation of the right to a jury trial in the Alabama Constitution requires even greater deference to jury determinations than that given by most states, which contributed to his conclusion that post-trial review could not cure the Constitutional deficiencies at the jury level.⁹

Unless judicial review amounts to a *de novo* trial of the issues and a determination of the punitive award upon a Constitutionally proper basis, judicial review could not cure the defects in the jury decision. Alabama review under *Hammond* criteria is not a trial *de novo*. As noted by the *amicus curiae* brief herein of the Alabama Defense Lawyers

⁹ *Charter Hospital Of Mobile, Inc. v. Weinberg*, 558 So.2d 909, 1990 Ala. Lexis 17 (1990), at 1990 Ala. Lexis, p. 19.

Association, post-trial review under *Hammond* has not resulted in any meaningful modification of the law. This is exemplified by the affirmance of the verdict in this case by the Alabama Supreme Court, primarily on the basis that jury verdicts are presumed to be valid [Pet. Cert., B 13].

In *Land & Associates, Inc. v. Simmons*, 562 So.2d 140 (Ala. 1989), cited by Respondents [Resp. Br. 31], the trial court remitted a \$2,500,000 award to \$600,000, stating, " 'The problem here is that \$2,500,000 is simply too much for the conduct of which defendants were guilty' " [*id.* at 28]. The court went on to state that considering the gravity of the wrong, the injury to plaintiff, and comparing other awards, the award should be reduced to \$600,000. The Alabama Supreme Court affirmed, on the grounds that awards which shock the conscience of the court may be considered to be excessive, and the trial court's consideration of the gravity of the wrong, the injury to plaintiff, and other awards satisfied *Hammond*.

Similarly, in *United States Automobile Association v. Wade*, 544 So.2d 906 (Ala. 1989), the trial court denied a motion for remittitur, after a bench trial. The Alabama Supreme Court ordered a remittitur of \$1,000,000 on the grounds that the \$3,500,000 award was excessive [544 So.2d at 917].

It is apparent that *Hammond* review in Alabama amounts to no more than a subjective test of excessiveness, transferring essentially unlimited discretion to the reviewing courts, in the absence of a prior prescription of the permitted range of punishment.

Alabama's procedures in this case, in sum and in part, failed to comply with the requirements of the Due Process Clause of the Fourteenth Amendment.

5. The Requirements Of Fundamental Fairness And Notice Included In The Due Process Clause Apply To The Amount Of Punishment As Well As Fair Notice Of Prohibited Conduct.

Respondents appear to contend that the requirements of Due Process apply only to definitions of prohibited conduct, but that unlimited discretion to impose punishment can be conferred upon courts or juries in determining sentences [Resp. Br. 38-43].

Respondents appear to contend that discretion to impose a life sentence, or a lesser term of years, is unlimited discretion. All of the statutes cited by Respondents set forth legislative upper limits of punishment, which as to some serious crimes, was either death, life imprisonment, or a lesser term of years, usually with a minimum stated.

It is this lack of a governmental determination of the upper limit of punishment in the punitive damages law of Alabama and most other states, which distinguishes it from the authorities relied upon by Respondents. Due Process requires that defendants be protected from arbitrary, discriminatory establishment of the degree of punishment after the fact. [See *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *Miller v. Florida*, 482 U.S. 423, 429, 435-436 (1987); *Giaccio v. Pennsylvania*, 382 U.S. 399, 401-403 (1966); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798).]

It is submitted that Due Process requires that permissible ranges of punishment be prescribed in advance of the conduct to be punished by punitive damages awards. Alabama's failure to do so requires that the award herein be vacated.

B. The Award Of Punitive Damages Against Pacific Mutual For The Fraud Of Mr. Ruffin Acting With Respect To The Medical Insurance Policy Of Another Company, And Against The Interests Of Pacific Mutual, Violated Due Process.

Respondents appear to contend that Pacific Mutual was negligent in failing to control Mr. Ruffin, and actively contributed to the success of Mr. Ruffin's fraud by not sending the lapse notices regarding the Pacific Mutual life insurance policies to the individual Respondents [Resp. Br. 4-7].

Respondents then contend that liability without fault is proper in all cases, and that punishment may be inflicted on a principal in the absence of benefit or intent to benefit by the agent. This argument is based primarily on the assertion that if fault were required, companies would be encouraged not to supervise agents [Resp. Br. 11-17].

It should first be noted that no evidence showed notice to Pacific Mutual's home office of Mr. Ruffin's conduct, even were Ms. Ault's testimony to be fully credited. At most, notice to Mr. Lupia was shown. Even here, Ms. Ault was not able to say that the instances she related involved Pacific Mutual policies or policyholders [Pet. Reply Cert. A11-14]. The assertion by the Alabama Supreme Court that notice to Pacific Mutual's home office was shown is without any support in the record.

It should also be noted Pacific Mutual in fact sent its lapse notices directly to Respondents [R.T. 836-837, and the lapse notices from Trial Exhibit 14, attached hereto as Appendix B-1 through B-4]. Respondents' argument that Pacific Mutual contributed to the success of Mr. Ruffin's alleged fraud is incorrect.

Respondents rely upon *American Society Of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982); and *Louis Pizitz Dry Goods v. Yeldell*, 274 U.S. 112 (1927) for

the proposition that punitive damages can be imposed without benefit or intent to benefit the principal.

In each of those cases, this Court found that the primary purpose of the awards was remedial and compensatory, not punitive, and therefore distinguished those cases from the requirements of purely punishment cases. Further, in *Hydrolevel*, this Court relied in part upon Restatement Agency 2d Section 217C, Comment c, which states that the rule limiting a principal's liability for punitive damages does not apply to special statutes giving treble damages. This was recognized in *Union City Barge Line, Inc. v. Union Carbide Co.*, 823 F.2d 127 (5th Cir. 1987), in which the court concluded that *Hydrolevel* did not authorize vicarious liability for agents' acts which harmed the principal.

It should also be noted that under settled law, the Respondents had the insurance coverage for which they paid premiums to Mr. Ruffin. To the extent Mr. Ruffin collected the premiums, the companies were bound. Had Mrs. Haslip, for example, submitted a claim to Union Fidelity, that company would have been bound to pay the claim [*National Life Ins. Co. v. Reedy*, 115 So.2d 8 (Ala. 1927); Couch on Insurance 2d (Rev. Ed.) Section 31:125].

However, Respondents elected not to contact the companies, but to file suit.

Respondents also fail to distinguish between vicarious liability for compensatory damages, and vicarious liability for punishment.

Mr. Ruffin had authority to sell policies. That scope of authority, however, did not extend to stealing premiums from the companies. As noted, each company was liable on its respective policy for the coverage paid for by Respondents, but was deprived of the premiums by Mr. Ruffin's acts. It is an entirely different matter to assert that Pacific Mutual should be punished because Mr. Ruffin misappropriated premiums from it and from Union Fidelity.

It is submitted that the authorities cited and discussed by Pacific Mutual in its Brief Of Petitioner are controlling, and that Due Process does not allow punishment to be imposed upon Pacific Mutual for Mr. Ruffin's acts under the circumstances of this case.

It is also submitted that the grounds upon which Pacific Mutual asserts that it cannot be punished in this case under Due Process do not require any dismantling of existing regulatory criminal enforcement programs, as Respondents assert.

While substantial questions can be raised regarding the Constitutional viability of crimes without *mens rea*, and punishment without fault [see, e. g., Hippard, "The Unconstitutionality Of Criminal Liability Without Fault: An Argument For A Constitutional Doctrine Of Mens Rea," 10 Houston L.Rev. 1039 (1973)], it is not necessary to reach those issues here. Pacific Mutual's position merely seeks application of the basic rule established in *New York Central and Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1909), that benefit to the company, or intent to benefit the company, is a necessary prerequisite to imposing punishment on a vicarious liability basis.

Mr. Ruffin was not acting in the business of Pacific Mutual when pocketing the premiums on the Pacific Mutual and Union Fidelity insurance policies, and clearly had no intent to benefit either company by misappropriating premiums due them, while binding them to the policy risks.

It is submitted that Due Process requires that the award against Pacific Mutual be vacated.

C. Additional Trial Safeguards Are Required By Due Process In Punitive Damages Cases.

Respondents contend that no enhanced burden of proof or other trial safeguards are required in punitive damages cases [Resp. Br. 46-48].

What Respondents ignore is the dynamics of punitive damages cases. As here, plaintiffs are less interested in obtaining contract or other benefits (Respondents did not bother to claim benefits) than in asserting a punitive damages claim so they and their attorneys can play courtroom roulette.¹⁰ Both plaintiffs and their counsel have a primary interest in obtaining a windfall award. The defendants are usually unpopular, target defendants, such as insurance companies, banks and employers.

All of this creates a significant risk of improper fact finding. As noted by the Indiana Supreme Court in *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349 (Ind.S.Ct. 1982), discussing the appropriate burden of proof in punitive damages cases, at page 363:

"Neither should it be assumed that one who stands to reap the harvest of a punitive damage award will, in all cases, himself be reasonable and forthright. . . ."

This is demonstrated in this case by the significant one hundred eighty degree shifts in Mrs. Haslip's testimony at the trial, from her previous deposition testimony [J.A. 47-62].

¹⁰ See *Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414 (5th Cir. 1990) [Jones, J., dissenting from denial of rehearing *en banc*, in which he stated, at page 1422: "One of the most unseemly features of our current legal system is its tendency to promote litigation as high-stakes gambling. . . . Punitive damages are a key feature of the abuse of the litigation process."]

It is submitted that the additional procedural protections suggested by Pacific Mutual are required by Due Process to improve the reliability of fact finding and decision making in these cases.

D. The Award Herein Was Excessive In Violation Of Pacific Mutual's Due Process Rights.

Respondents' arguments that the award herein is justified when measured by the standard used to evaluate economic regulations [Resp. Br. 43-46] are without merit.

Punitive damages are not economic regulations. They are fines imposed to further a public interest in punishment. As such, the award, and the substantive law and procedures under which it was imposed, should properly be subjected to heightened scrutiny.

Solem v. Helm, 463 U.S. 277 (1983), attempted to introduce objectivity into excessiveness/proportionality review. Such a review of punitive damages would properly consider legislative criminal and civil penalties for similar conduct. Respondents' contention that such penalties are set in anticipation of supplemental punitive damage enforcement is derived wholly from thin air.

It is submitted that the award below was excessive, in violation of Pacific Mutual's Due Process rights.

CONCLUSION

Respondents have asserted a number of propositions which are not supported by the authority relied upon. Further, none of the arguments advanced refute the basic points asserted by Pacific Mutual.

Present punitive damage law in Alabama and most other states is fundamentally unfair. It authorizes vague, incomprehensible and ineffective jury instructions which give no guidance as to whether punishment is merited and if so, how much. It fails to set limits on jury or court discretion by limiting the awards which may be made by prior prescription of a permitted range of punishment. Even if the Alabama jury instruction had contained each of the *Hammond* criteria, the discretion of both the jury and reviewing courts would remain so broad that juries would still be free to render awards based upon their individual backgrounds, temperaments and societal concerns. As noted in *Michigan C.R. Co. v. Vreeland*, 227 U.S. 59, 71-74 (1913), this throws "the door open to the widest speculation. . . . These experiences, which were to be the standard, would, of course, be as various as [the jurors'] tastes, habits and opinion."

It is submitted that the Due Process Clause of the Fourteenth Amendment requires prior establishment of a permitted range of punishment by awards of punitive damages. Because of the broad range of conduct and fact situations which may be found to subject a party to such awards, it would appear that some substantial tailoring of fines to categories of conduct would also be necessary to make the system operate fairly and rationally. Otherwise, each award would still raise a claim of excessiveness under either Due Process or the tests in *Solem v. Helm*, 463 U.S. 277 (1983).

Because of the ambiguous context in which these cases frequently arise, regarding whether or not punishable conduct has occurred, some further guidance to juries appears

necessary for making determinations within the specified permitted range of punishment.

It is submitted that the award of punitive damages herein should be vacated as violating the rights of Pacific Mutual under the Due Process Clause of the Fourteenth Amendment. Such an order would not Federalize state punitive damages law. It would merely require that the appropriate state authority define the punishable conduct and set the permitted ranges of punishment, therefore, prospectively, and that juries be properly guided. The resulting standards would be reviewable if necessary under *Solem v. Helm*, 463 U.S. 277 (1983).

Respectfully submitted,

Of Counsel:

VICKI W.W. LAI
ADAMS, DUQUE
& HAZELTINE

BRUCE A. BECKMAN
Counsel of Record
ADAMS, DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014]
(213) 620-1240

OLLIE L. BLAN, JR.
BERT S. NETTLES
SPAIN, GILLON,
GROOMS, BLAN
& NETTLES

J. MARK HART
SPAIN, GILLON, GROOMS
BLAN & NETTLES
2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

Attorneys for Petitioner
Pacific Mutual Life Insurance
Company

APPENDIX A

**PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES
OF \$500,000 OR MORE
FROM JANUARY 1, 1990 TO AUGUST 7, 1990¹
(* indicates wrongful death case)**

1. *Wilburn v. Luxaire, et al.* \$50,000,000*
Mobile County Circuit Court
CV-88-147 *et seq.* (April, 1990)
\$50,000,000 punitive damages,
plus previous settlement of
\$11,500,000 for wrongful death
of five-member family resulting
from alleged negligence involving
heating unit.
2. *Helen Lewis Johnston, as parent* 15,000,000*
and custodian of Barton Lewis
Griffin, deceased, and Ford Lewis
v. L. B. Chapman, B. W. Wilson
& Sons, and General Motors Corp.
Marengo County Circuit Court
CV-88-117 (August 3, 1990)
Wrongful death of child.
~~Alleged~~ defective product in vehicle
computer system.
Verdict against General Motors only.
Post-trial motions pending.

¹This is a correction and update to Appendix 1 of Petitioner's main brief. The lists are in all likelihood still incomplete due to the lack of any central record or reporting system as to jury verdicts in Alabama. Magnifying the significance of these lists is the fact that 90% to 95% of all civil cases are settled. Obviously, the mushrooming number and size of punitive damage verdicts impact tremendously on the money paid in those settlements.

3. *Overstreet v. Insurance Company of North America, et al.* \$10,000,000
Mobile County Circuit Court
CV-86-002312 (June 8, 1990)
Alleged insurance fraud.
\$10,000,000 punitive damages
award against agency, individuals
dismissed.

4. *Annie B. Smith v. MBL Life Assurance Corp. and Mutual Benefit Life Insurance Co.* 4,500,000
Jefferson County Circuit Court
CV-84-3028 (June 1990)
\$4,500,000 punitive damages and
\$250,000 compensatory damages
in breach of contract, fraud and
bad faith case on question of exis-
tence of life insurance policy.
Post-trial motions pending.

5. *Sue Chumney as Administrator of the Estate of Christopher E. Long, deceased v. Flowers Hospital* 3,000,000*
Houston County Circuit Court
CV-87-587 (1990)
Wrongful death of child.
Settled post-trial.

6. *Tate v. P.P.G. Industries* 2,500,000*
U.S. District Court for the
Southern District of Alabama
(February 19, 1990)
Punitive damages for wantonness
in wrongful death case.

7. *Shelby King v. Pioneer Life Insurance Co.* \$ 2,000,000
Escambia County Circuit Court
CV-87-152 (July 31, 1990)
Breach of contract and bad
faith suit.
\$2,000,000 verdict includes
approximately \$23,000 compen-
satory damages and \$1,977,000
punitive damages for breach of
contract.
Appeal pending.

8. *Burden v. Empire Fire & Marine Ins. Co.* 1,400,000
Lauderdale County Circuit Court
CV-88-244 (March 2, 1990)
Alleged bad faith for failing to
settle uninsured motorist claim.
\$400,000 awarded for compen-
satory damages and \$1,000,000
for punitive damages.
Post-trial motions pending.

9. *American Employers Insurance Company v. Southern Seeding Services, Inc., et al.* 1,150,000
U.S. District Court for the
Northern District of Alabama
CV-87-G-0294S
Verdict awarding \$400,000 in
compensatory damages and
\$750,000 in punitive damages
on February 22, 1990.
Appeal filed March 27, 1990.

10. *Tom Beaty, Jr. v. Ford-New Holland Tractor Co. and Larry Lilly* \$ 1,025,000
Barbour County Circuit Court,
Clayton Division
CV-89-012 (August 7, 1990)
Verdict awarding \$25,000 in
compensatory damages and
\$1,000,000 in punitive damages
in malicious prosecution suit.
11. *Fuller v. Preferred Risk Life Insurance Co.* 1,016,765.82
Montgomery County Circuit Court
CV-88-744M (February 7, 1990)
Alleged breach of contract and
insurance fraud.
\$16,764.82 compensatory damages
on breach of contract; \$1,000,000
punitive damages and \$1.00 com-
pensatory damages on fraud count.
Punitive damages remitted to \$250,000
on Motion for JNOV/New Trial.
Appeal Pending.
12. *Braden v. Dorsey Motor Sales, Inc.* 1,000,000
Autauga County Circuit Court
(April 3, 1990)
\$1,000,000 punitive damages,
\$15,600 compensatory damages
for alleged fraudulent misrepre-
sentation by car dealer that a used
car was "new."

13. *William Thornton v. Yamaha Motor Co., Ltd., et al.* \$ 750,000*
Montgomery County Circuit Court
CV-88-1639-TH (April 18, 1990)
Wrongful death.
No appeal pending.

APPENDIX B

- B 1

PACIFIC MUTUAL
FINAL STATEMENT — LAPSED POLICY

DATE OF LAPSE: DEC 01 1981

POLICY NO.: 204 6097 0

INSURED: CYNTHIA E. CRAIG

PREM. MODE: MONTHLY

PREMIUM: 13.40

Agent	Agency	Issue Yr.	Age	Bill Type	Own'r Code	Caut.
00Y6X	362	81	24	64	10	1

MAILING NAME AND ADDRESS

CYNTHIA E. CRAIG
531 BOOKER STREET
ROOSEVELT AL 35020

SERVICE OFFICE

PACIFIC MUTUAL
BIRMINGHAM-LUPIA AGENCY
530 BEACON PARKWAY WEST
BIRMINGHAM AL 35259

SERVICING AGENT

RUFFIN LEMMIE L JR

POLICY INFORMATION

YOUR POLICY HAS NO VALUE TO BE USED TO
EXERCISE THE NON-FORFEITURE OPTION AND ALL
PROTECTION HAS CEASED

THE AUTOMATIC PREMIUM LOAN PROVISION DID
NOT APPLY BECAUSE THE POLICY'S VALUE WAS
INSUFFICIENT TO PAY THE PREMIUM

- B 2 -

PACIFIC MUTUAL
FINAL STATEMENT — LAPSED POLICY

DATE OF LAPSE: DEC 01 1981

POLICY NO.: 204 6106 0
INSURED: EDDIE HARGROVE
PREM. MODE: MONTHLY
PREMIUM: 32.70

Agent	Agency	Issue Yr.	Age	Bill Type	Own'r Code	Caut.
00Y6X	362	81	47	64	10	1

MAILING NAME AND ADDRESS

EDDIE HARGROVE
3109 CLAREDON AVE
BESSEMER AL 35020

SERVICE OFFICE

PACIFIC MUTUAL
BIRMINGHAM-LUPIA AGENCY
530 BEACON PARKWAY WEST
BIRMINGHAM AL 35259

SERVICING AGENT

RUFFIN LEMMIE L JR

POLICY INFORMATION

YOUR POLICY HAS NO VALUE TO BE USED TO
EXERCISE THE NON-FORFEITURE OPTION AND ALL
PROTECTION HAS CEASED

THE AUTOMATIC PREMIUM LOAN PROVISION DID
NOT APPLY BECAUSE THE POLICY'S VALUE WAS
INSUFFICIENT TO PAY THE PREMIUM

- B 3 -

PACIFIC MUTUAL
FINAL STATEMENT — LAPSED POLICY

DATE OF LAPSE: DEC 01 1981

POLICY NO.: 204 6104 0
INSURED: ALMA M. CALHOUN
PREM. MODE: MONTHLY
PREMIUM: 19.70

Agent	Agency	Issue Yr.	Age	Bill Type	Own'r Code	Caut.
00Y6X	362	81	36	64	10	1

MAILING NAME AND ADDRESS

ALMA M. CALHOUN
2214 IVEY ST
ROOSEVELT CITY AL 35020

SERVICE OFFICE

PACIFIC MUTUAL
BIRMINGHAM-LUPIA AGENCY
530 BEACON PARKWAY WEST
BIRMINGHAM AL 35259

SERVICING AGENT

RUFFIN LEMMIE L JR

POLICY INFORMATION

YOUR POLICY HAS NO VALUE TO BE USED TO
EXERCISE THE NON-FORFEITURE OPTION AND ALL
PROTECTION HAS CEASED

THE AUTOMATIC PREMIUM LOAN PROVISION DID
NOT APPLY BECAUSE THE POLICY'S VALUE WAS
INSUFFICIENT TO PAY THE PREMIUM

**PACIFIC MUTUAL
FINAL STATEMENT — LAPSED POLICY**

DATE OF LAPSE: DEC 01 1981

POLICY NO.: 204 6100 0

INSURED: CLEOPATRA HASLIP

PREM. MODE: MONTHLY

PREMIUM: 29.40

Agent	Agency	Issue Yr.	Age	Bill Type	Own'r Code	Caut.
00Y6X	362	81	46	64	10	1

MAILING NAME AND ADDRESS

**CLEOPATRA HASLIP
318 WOODWARD AVE
ROOSEVELT CITY AL 35020**

SERVICE OFFICE

**PACIFIC MUTUAL
BIRMINGHAM-LUPIA AGENCY
530 BEACON PARKWAY WEST
BIRMINGHAM AL 35259**

SERVICING AGENT

RUFFIN LEMMIE L JR

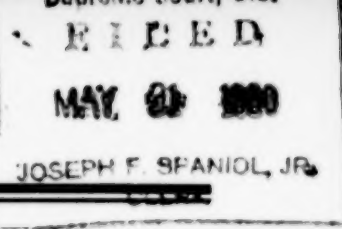
POLICY INFORMATION

**YOUR POLICY HAS NO VALUE TO BE USED TO
EXERCISE THE NON-FORFEITURE OPTION AND ALL
PROTECTION HAS CEASED**

**THE AUTOMATIC PREMIUM LOAN PROVISION DID
NOT APPLY BECAUSE THE POLICY'S VALUE WAS
INSUFFICIENT TO PAY THE PREMIUM**

(5)

No. 89-1279



IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF THE
PHARMACEUTICAL MANUFACTURERS ASSOCIATION
AND THE AMERICAN MEDICAL ASSOCIATION,
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:

BRUCE J. BRENNAN
EDWIN C. MULCAHY
LORETTA E. CHI
PHARMACEUTICAL MANUFACTURERS
ASSOCIATION
1100 Fifteenth Street, N.W.
Washington, D.C. 20005

KIRK B. JOHNSON
MARTIN F. HATLIE
AMERICAN MEDICAL ASSOCIATION
535 North Dearborn
Chicago, Illinois 60610

May 31, 1990

RICHARD F. KINGHAM
(Counsel of Record)
BRUCE N. KUHLIK
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for the Amici Curiae

QUESTION PRESENTED

Whether an award of punitive damages violates the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
I. THE NATURE OF THE PHARMACEUTICAL INDUSTRY MAKES IT UNIQUELY VUL- NERABLE TO ARBITRARY PUNITIVE DAM- AGE AWARDS	5
A. Drug Research And Development Is An Ex- pensive And Highly Regulated Enterprise....	6
B. Prescription Drugs Inevitably Cause Harm To Some Patients	7
C. The Routine Presence Of Punitive Damage Counts And The Absence Of Standards Have Particularly Undesirable Consequences For Pharmaceutical Product Liability Litigation..	11
II. STANDARDLESS PUNITIVE DAMAGE AWARDS AND CLAIMS HAVE ADVERSELY AFFECTED THE AVAILABILITY AND DEVELOPMENT OF PHARMACEUTICAL THERAPIES	15
A. Vaccines	16
B. Contraceptives And Drugs For Pregnant Women	19
C. Other Drug Products	22
III. CONSTITUTIONAL STANDARDS CIRCUM- SCRIBING THE AWARD OF PUNITIVE DAMAGES ARE NECESSARY	23
CONCLUSION	26

TABLE OF AUTHORITIES

Cases:	Page
<i>Bankers Life & Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988)	25
<i>Bendectin Litigation, In re</i> , 857 F.2d 290 (6th Cir. 1988), <i>cert. denied</i> , 109 S. Ct. 788 (1989)	21
<i>Blum v. Merrell Dow Pharmaceuticals, Inc.</i> , 1 Pa. D.&C. 4th 634 (Penn. Ct. of Common Pleas (1988), <i>rev'd in part and aff'd in part</i> , 385 Pa. Super. 151, 560 A.2d 212 (1989)	21
<i>Brock v. Merrell Dow Pharmaceuticals, Inc.</i> , L-83-148-CA (E.D. Tex. Mar. 4, 1988), <i>rev'd</i> , 874 F.2d 307, <i>mod.</i> , 884 F.2d 166, <i>reh'g denied</i> , 884 F.2d 167 (5th Cir. 1989), <i>cert. denied</i> , 110 S. Ct. 1511 (1990)	21
<i>Brown v. Superior Court (Abbott Laboratories)</i> , 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988)	6, 8
<i>Browning-Ferris Industries v. Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989)	5, 15, 24, 25
<i>Chelos v. Endo Laboratories, Inc.</i> , No. 87-0013 (Ill. App.)	4, 22
<i>Ealy v. Richardson-Merrell, Inc.</i> , No. 83-3504 (D.D.C. Oct. 1, 1987), <i>rev'd</i> , 897 F.2d 1159 (D.C. Cir. 1990)	21
<i>Johnson v. American Cyanamid Co.</i> , 239 Kan. 279, 718 P.2d 1318 (1986)	17
<i>Juzwin v. Amtorg Trading Corp.</i> , 705 F.Supp. 1053, <i>recon. granted</i> , 718 F.Supp. 1233 (D.N.J. 1989)	26
<i>Oxendine v. Merrell Dow Pharmaceutical, Inc.</i> , No. 1245-82 (D.C. Super. Ct. Apr. 19, 1990)	21
<i>Richardson v. Richardson-Merrell, Inc.</i> , 649 F. Supp. 799 (D.D.C. 1986), <i>aff'd</i> , 857 F.2d 823 (D.C. Cir. 1988), <i>cert. denied</i> , 110 S. Ct. 218 (1989)	20, 21
<i>Roginsky v. Richardson-Merrell, Inc.</i> , 378 F.2d 832 (2d Cir. 1967)	12, 14
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982)	25

TABLE OF AUTHORITIES—Continued

	Page
<i>Wooderson v. Ortho Pharmaceutical Corp.</i> , 235 Kan. 387, 681 P.2d 1038, <i>cert. denied</i> , 469 U.S. 965 (1984)	4, 20
Statutes, Regulations, and Rules:	
21 U.S.C. § 332	6
21 U.S.C. § 333 (a) (1)	6
21 U.S.C. § 333 (a) (2)	6
21 U.S.C. § 334	6
21 U.S.C. §§ 351-355	6
21 U.S.C. § 353 (b) (1) (B)	7
21 U.S.C. § 355	6
42 U.S.C. § 262	6
42 U.S.C. §§ 300aa-1 <i>et seq.</i>	18
42 U.S.C. § 300aa-23	13, 25
42 U.S.C. § 300aa-23 (d) (2)	18
21 C.F.R. Parts 200 <i>et seq.</i>	6
21 C.F.R. §§ 312.32-312.33	13
21 C.F.R. § 314.80	13
Sup. Ct. R. 37	3
Ariz. Rev. Stat. § 12-701	25
N.J. Stat. Ann. § 2A:58C-5 (c)	25
Ohio Rev. Code Ann. § 2307.80	25
Or. Rev. Stat. § 30.927	25
Utah Code Ann. § 78-18-2	25
Other:	
AMA Board of Trustees, "Impact of Product Liability on the Development of New Medical Technologies" (June 1988) [AMA Report]	<i>passim</i>
Cohn, "The Beginnings: Laboratory and Animal Studies," in <i>From Test Tube to Patient: New Drug Development in the United States</i> (Jan. 1988)	7
DiMasi, <i>et al.</i> , "The Cost of Innovation in the Pharmaceutical Industry: New Drug R&D Estimates" (1990)	7
<i>Drug Price Competition and Patent Term Restoration Act of 1984: Hearing Before the Senate Comm. on Labor and Human Resources</i> , 98th Cong., 2d Sess. (1984)	7

TABLE OF AUTHORITIES—Continued

	Page
Farley, "Benefit vs. Risk: How FDA Approves New Drugs," in <i>"From Test Tube to Patient: New Drug Development in the United States"</i> (Jan. 1988)	9
Flieger, "Testing in 'Real People,'" in <i>From Test Tube to Patient: New Drug Development in the United States</i> (Jan. 1988)	7
FDA, "Biological Products; Bacterial Vaccines Toxoids; Implementation of Efficacy Review," 50 Fed. Reg. 51002 (Dec. 13, 1985)	15
FDA, "Investigational New Drug, Antibiotic, and Biological Drug Product Regulations; Procedures for Drugs Intended to Treat Life-Threatening and Severely Debilitating Illnesses," 53 Fed. Reg. 41516 (Oct. 21, 1988)	11
General Accounting Office, "FDA Drug Approval—A Lengthy Process That Delays the Availability of Important New Drugs" (1980)	10
Gilman, A., et al., <i>Goodman and Gilman's The Pharmacological Basis of Therapeutics</i> (7th ed. 1985) [Goodman and Gilman]	7, 8, 9, 10
Hearings on Drug Safety Before the Subcomm. on Intergovernmental Relations of the House Comm. on Government Operations, 88th Cong., 2d Sess. (1964) [Drug Safety Hearings]	8, 9
Hinman, et al., "The Opportunity and Obligation to Eliminate Measles From the United States," 242 J. Am. Med. Ass'n 1157 (1979)	5
Hinman & Koplan, "Pertussis and Pertussis Vaccine: Reanalysis of Benefits, Risks, and Costs," 251 J. Am. Med. Ass'n 3109 (1984)	5
H.R. Rep. No. 908, 99th Cong., 2d Sess. (1986) [House Vaccine Report]	13, 16, 17, 18
Huber, P., <i>Liability: The Legal Revolution and Its Consequences</i> (1988)	12, 13, 16, 18, 20
Innovation and Patent Law Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice Before the House Comm. on the Judiciary, 98th Cong., 2d Sess. (1984)	7

TABLE OF AUTHORITIES—Continued

	Page
Institute of Medicine, <i>New Vaccine Development: Establishing Priorities</i> (1985)	10
Institute of Medicine, <i>Vaccine Supply and Innovation</i> (1985) [Vaccine Supply]	16, 17, 18
Jeffries, "A Comment on the Constitutionality of Punitive Damages," 72 Va. L. Rev. 139 (1986) ..	13, 20
Marcus, "Liability for Vaccine-Related Injuries," 318 N. Eng. J. Med. 191 (1988)	19
Merrill, "Compensation for Prescription Drug Injuries," 59 Va. L. Rev. 1 (1973)	9
National Research Council & Institute of Medicine, <i>Developing New Contraceptives—Obstacles and Opportunities</i> (L. Mastroianni, et al., eds. 1990)	19
Patent Term Extension and Pharmaceutical Innovation: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology, 97th Cong., 2d Sess. 131 (1982)	5
Restatement (Second) of Torts § 402A, comment k	8-9
Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, "Childhood Immunizations," 99th Cong., 2d Sess. (Comm. Print 1986)	17
Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology, "The Food and Drug Administration's Process for Approving New Drugs," 96th Cong., 2d Sess. (Comm. Print 1980) [FDA Approval Process]	6, 9, 11, 14
Vaccine Injury Compensation: Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess. (1986)	16
Wiggins, "The Cost of Developing a New Drug" (PMA 1987)	7
Young, "The Reality Behind the Headlines," in <i>From Test Tube to Patient: New Drug Development in the United States</i> (Jan. 1988)	7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

**On Writ of Certiorari to the
Supreme Court of Alabama**

**BRIEF OF THE
PHARMACEUTICAL MANUFACTURERS ASSOCIATION
AND THE AMERICAN MEDICAL ASSOCIATION,
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

INTEREST OF THE *AMICI CURIAE*

The Pharmaceutical Manufacturers Association (PMA) is a voluntary, nonprofit association representing more than 100 research-intensive companies engaged in the discovery and development of prescription pharmaceutical products. PMA member companies produce the vast majority of the prescription medicines used in the United States. They annually invest more than \$8 billion in research and development. This substantial private research effort is the source of virtually all new drugs marketed in the United States.

The American Medical Association (AMA) is a private, voluntary, nonprofit organization of physicians. It was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, it is the largest health-care organization in the United States, representing the interests of more than 280,000 physicians and their patients in promoting the availability and quality of health care.

Amici are concerned because the threat and award of standardless and excessive punitive damage judgments against pharmaceutical manufacturers is compromising the industry's research efforts and depriving Americans of significant pharmaceutical therapies. In important areas such as childhood vaccines and drugs for pregnant women, liability concerns already have had a demonstrable negative impact both on research and on the continued availability of beneficial products to the persons who need them. These adverse developments have impaired physicians' access to important and often unique pharmaceutical therapies and have thereby interfered with their ability to provide the highest possible quality of medical care to their patients.

In addition, the AMA is concerned that physicians are increasingly being confronted directly with claims for punitive damages by plaintiffs alleging malpractice. Although as a practical matter awards against health-care providers are extremely rare, the availability of unlimited punitive damages remains a serious source of anxiety for them and, like other facets of the medical malpractice crisis, excessive punitive damage awards adversely affect how physicians practice medicine.

Because of the special nature of the pharmaceutical industry, the development and distribution of new drugs have been compromised to an unusual extent by the recent explosion in punitive damage liability. Research and development are expensive, time-consuming tasks. Despite extensive testing and unusually exacting regula-

tion by the federal government, full knowledge of the risks presented by new drugs can never be gained prior to marketing. In addition, all drugs are associated with adverse events in some patients. These harms cannot be avoided regardless of the degree of care exercised by the manufacturer and the prescriber. See pages 7-11, *infra*.

The AMA has studied the effects of product liability on the provision of health care and found that punitive damages and other liability issues "are having a profound negative impact on the development and utilization of potentially life-saving medical technologies."¹ This brief will document the deleterious effects of standardless punitive damages on the availability of pharmaceutical products. *Amici* hope that this additional perspective will assist the Court in appreciating the need for reasonable, ascertainable constitutional standards that are applicable to the award of punitive damages.²

SUMMARY OF ARGUMENT

The use of prescription drug products saves thousands of lives and billions of dollars each year. New drugs are developed almost exclusively by private industry, at an average cost of more than \$230 million from chemical synthesis to approval by the Food and Drug Administration. FDA requires extensive clinical testing prior to marketing, and the agency approves a drug only upon its independent determination that the benefits of the product outweigh its risks.

The pharmaceutical industry's research and drug marketing decisions are particularly vulnerable to distortion from punitive damage awards imposed without adequate

¹ AMA Board of Trustees, "Impact of Product Liability on the Development of New Medical Technologies," at 12 (June 1988) [hereinafter cited as *AMA Report*].

² Pursuant to Rule 37 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

constitutional safeguards. All drugs are unavoidably associated with adverse events in some patients; many of these events cannot be discovered prior to widespread distribution. The inevitability of injury makes manufacturers repeated targets of lawsuits involving even the safest drugs. Those lawsuits now routinely include multi-million dollar claims for punitive damages, and such punitive damage counts skew the entire course of litigation, increasing both costs and settlement demands.

The result is that pharmaceutical manufacturers have been forced to withdraw beneficial products from the market and to forgo research into new products in particularly litigation-prone areas, such as vaccines and contraceptives. For example, excessive punitive damage awards have been entered in cases where the manufacturer's conduct was approved and indeed required by FDA;³ where no scientifically plausible relation could be shown between the drug and the injury;⁴ and where the plaintiff's attorney had suggested some sort of "formula" by which punitive damages should be calculated.⁵

The prospect of standardless, excessive multi-million dollar punitive damage awards thus taints the entire drug development process. *Amici* suggest that the Court's determination of the limits required by the Due Process Clause on punitive damage awards should take into account the effect of these awards on the availability of drug therapies. In particular, any award of punitive damages for lawful conduct approved in advance by the FDA must be deemed arbitrary and excessive in violation of the Due Process Clause of the Fourteenth Amendment;

³ See *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert. denied*, 469 U.S. 965 (1984) (oral contraceptive), discussed at page 20, *infra*.

⁴ See cases involving the anti-nausea drug Bendectin, discussed at pages 20-22, *infra*.

⁵ See *Chelos v. Endo Laboratories*, No. 87-0113 (Ill. App.) (anti-coagulant drug Coumadin), discussed at pages 22-23, *infra*.

individual punitive damage awards should be subject to careful judicial oversight and procedural safeguards should be required in order to ensure that punitive damage awards do not disserve society's interests in the availability of pharmaceutical products; and the possibility of multiple awards for the same course of conduct must be taken into consideration.

ARGUMENT

I. THE NATURE OF THE PHARMACEUTICAL INDUSTRY MAKES IT UNIQUELY VULNERABLE TO ARBITRARY PUNITIVE DAMAGE AWARDS.

Prescription drug therapies are among the most useful and cost-effective components of medical care.⁶ A number of factors, however, create special concerns in this industry with respect to liability in general and punitive damages in particular. As Justice O'Connor recently noted, "[t]he threat of * * * enormous [punitive damage] awards has a detrimental effect on the research and development of new products," including prescription drugs.⁷ *Amici* suggest that, in deciding what constitutional constraints to impose on punitive damages, the Court must be conscious of the need to "vindicate the public's interest

⁶ See, e.g., *Patent Term Extension and Pharmaceutical Innovation: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 97th Cong., 2d Sess. 131 (statement of Mr. Hutt) ("The development of new drugs, and new methods of using and making older drugs, represents the single greatest hope of this country for holding down health care costs."). Childhood vaccines, for example, have been conservatively estimated to have a benefit/cost ratio of more than ten to one. See *Hinman, et al.*, "The Opportunity and Obligation to Eliminate Measles From the United States," 242 J. Am. Med. Ass'n 1157 (1979); *Hinman & Koplan*, "Pertussis and Pertussis Vaccine: Reanalysis of Benefits, Risks, and Costs," 251 J. Am. Med. Ass'n 3109 (1984).

⁷ *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2924 (1989) (O'Connor, J., concurring in part and dissenting in part).

in the availability and affordability of prescription drugs.”⁸

A. Drug Research And Development Is An Expensive And Highly Regulated Enterprise.

New drug development is accomplished in this country almost exclusively by private firms under close regulation by an expert federal regulatory agency, the Food and Drug Administration (FDA). Federal law establishes a system of premarket approval for new drugs to ensure that they are safe and effective.⁹ Under this system, FDA, with the advice of outside medical authorities, carefully regulates the premarket testing of new drugs, the approval process, drug manufacturing, labeling and advertising, and post-approval reporting of adverse events.¹⁰ The regulatory controls over new drugs are enforced through criminal penalties as well as civil sanctions,¹¹ and constitute a pervasive system of federal regulation that is unmatched in any other industry.¹²

⁸ *Brown v. Superior Court* (Abbott Laboratories), 44 Cal. 3d 1049, 1068, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

⁹ See 21 U.S.C. § 355.

¹⁰ See 21 U.S.C. §§ 351-355; 21 C.F.R. Parts 200 *et seq.* FDA also imposes analogous regulatory requirements on biological products such as vaccines, pursuant to section 351 of the Public Health Service Act, 42 U.S.C. § 262.

¹¹ See, e.g., 21 U.S.C. § 333(a)(2) (felony violations punishable by imprisonment for not more than three years or a fine of not more than \$10,000 or both); *id.* § 333(a)(1) (misdemeanor violations); *id.* § 332 (injunction proceedings); *id.* § 334 (seizures).

¹² See generally Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology, “The Food and Drug Administration’s Process for Approving New Drugs,” 96th Cong., 2d Sess. 21 (Comm. Print 1980) [hereinafter cited as *FDA Approval Process*] (“the FDA product approval process has become far more sophisticated than the approval process for most other products and also more cumbersome”).

The FDA approval process consumes an average of twelve years between the discovery and synthesis of a new chemical entity and its approval for marketing.¹³ The cost of bringing a single new drug to market has been estimated at more than \$230 million.¹⁴ In addition, pharmaceutical firms bear significant business risks during the development process: only one out of every several thousand tested chemical compounds ultimately is approved for marketing.¹⁵

B. Prescription Drugs Inevitably Cause Harm To Some Patients.

The extensive regulation of new drugs is justified by their potential for harm.¹⁶ As a leading medical textbook on drug therapy states, “[v]ery few physicians believe that any drug * * * is free of toxic effects.”¹⁷ FDA

¹³ See DiMasi, *et al.*, “The Cost of Innovation in the Pharmaceutical Industry: New Drug R&D Estimates” (1990); Young, “The Reality Behind the Headlines,” in *From Test Tube to Patient: New Drug Development in the United States* (Jan. 1988), at 5 [hereinafter cited as *New Drug Development*]. The author was Commissioner of Food and Drugs.

¹⁴ See DiMasi, *supra*; see also Wiggins, “The Cost of Developing a New Drug” (PMA 1987); Cohn, “The Beginnings: Laboratory and Animal Studies,” in *New Drug Development, supra*, at 9; *Drug Price Competition and Patent Term Restoration Act of 1984: Hearing Before the Senate Comm. on Labor and Human Resources*, 98th Cong., 2d Sess. 106 (1984).

¹⁵ See *Innovation and Patent Law Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 1206 (1984). Even among the compounds that survive preclinical testing and are then tested in humans, only 20% ultimately are approved. See Flieger, “Testing in ‘Real People,’” in *New Drug Development, supra*, at 14.

¹⁶ Federal law expressly refers to the “toxicity or other potentiality for harmful effect” of prescription drugs. 21 U.S.C. § 353(b)(1)(B).

¹⁷ A. Gilman, *et al.*, *Goodman and Gilman’s The Pharmacological Basis of Therapeutics* 59 (7th ed. 1985) [hereinafter cited as *Goodman and Gilman*].

agrees that "there is no such thing as absolute safety in drugs."¹⁸ For example, at least 300 persons die each year from anaphylactic reactions to penicillin.¹⁹ Prescription drugs are perhaps the clearest example of products that are "unavoidably unsafe" as defined in comment k to section 402A of the *Restatement (Second) of Torts*.²⁰

¹⁸ *Hearings on Drug Safety Before the Subcomm. on Intergovernmental Relations of the House Comm. on Government Operations*, 88th Cong., 2d Sess., pt. 1, at 147 (1964) (testimony of former FDA Commissioner Larrick) [hereinafter cited as *Drug Safety Hearings*].

¹⁹ See *Goodman and Gilman, supra*, at 1135. Physicians are well-aware of the possibility of anaphylaxis following penicillin administration, and a warning concerning this reaction is prominently featured in the drug's labeling. Nonetheless, it is impossible to predict whether a particular person will suffer such a reaction, and it can therefore be avoided for certain only by forgoing penicillin therapy altogether. The number of deaths from penicillin anaphylaxis represents only 0.001% of patients who are treated with the drug. *Id.*

²⁰ See, e.g., *Brown v. Superior Court (Abbott Laboratories)*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988). Comment k provides:

Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warnings, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but

FDA makes an expert determination of whether a new drug's benefits outweigh its risks before approving the drug for marketing:

Although no provision of the Federal Food, Drug, and Cosmetic Act provides that the FDA may approve a drug only if the benefits outweigh the risks, this inevitably is the crux of any decision to permit a new drug to be marketed or to allow an old one to remain on the market.²¹

This risk-benefit determination is made on the basis of all available information, but that information is necessarily incomplete. Despite premarket clinical testing in thousands of patients, many reactions are so rare that typically one-half or more of a new drug's adverse reactions cannot be discovered until after it is on the market and in widespread use.²² As the Institute of Medicine observed with respect to new childhood vaccines, "it will be exceptionally difficult to define the frequency (if any)

such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Restatement (Second) of Torts § 402A, comment k (emphasis in original).

²¹ Merrill, "Compensation for Prescription Drug Injuries," 59 Va. L. Rev. 1, 10 (1973), citing *Drug Safety Hearings, supra*, at 150. The author is a former FDA Chief Counsel. Accord, *Goodman and Gilman, supra*, at 57; Farley, "Benefit vs. Risk: How FDA Approves New Drugs," in *New Drug Development, supra*, at 27. FDA's risk-benefit determination is grounded in the statutory requirements that new drugs be safe and effective. See *FDA Approval Process, supra*, at 21.

²² See *Goodman and Gilman, supra*, at 51; Merrill, "Compensation for Prescription Drug Injuries," *supra*, 59 Va. L. Rev. at 10.

of rare but potentially catastrophic reactions without administration of the vaccine to millions of children.”²³ In addition, beyond the sheer difference in numbers involved, clinical trials are limited in their predictive capabilities because controlled experimental conditions are not duplicated in the typical physician’s day-to-day practice.²⁴

Accordingly, pharmaceutical manufacturers place their products on the market with full knowledge that some persons unavoidably will be injured, that the number of injured persons could well be quite large once hundreds of thousands or millions of persons are prescribed a particular drug in the regular course of medical practice, and that not all of the drug’s possible adverse reactions have in fact been identified in the clinical trials. FDA’s approval certifies that an unbiased expert regulatory body has concluded that these risks are outweighed by the drug’s therapeutic benefits, and thus represents society’s judgment that a particular drug should in fact be marketed.

In making this judgment, FDA must take into account not only the possibility of adverse reactions if a drug is marketed, but also the many thousands of lives that could be endangered and even lost if a drug is *not* approved for use. FDA has been extraordinarily conservative in approving new drugs, and in fact many important therapies are not made available in the United States until years after they have been approved in other western countries.²⁵ As a congressional report observed:

²³ 1 Institute of Medicine, *New Vaccine Development: Establishing Priorities* 179 (1985).

²⁴ See *Goodman and Gilman, supra*, at 51 (“The results of clinical trials * * * may have severe limitations in terms of what can be expected of drugs when they are used in an office practice.”).

²⁵ See, e.g., General Accounting Office, “FDA Drug Approval—A Lengthy Process That Delays the Availability of Important New Drugs” (1980). FDA recently issued an interim rule “designed to speed the availability of new therapies for desperately ill patients,

[D]elays in the approval of a drug deprive the sick from medicines which are life-saving, reduce suffering, and/or help maintain a productive life. Therefore, any protection conferred by delaying the introduction of new drugs must be weighed against the therapeutic losses incurred by delaying effective new therapies.²⁶

Limited testing cannot proceed indefinitely without endangering many more lives than might be saved by a more complete data base. There comes a point when the agency, in its expert judgement, concludes that a drug presents a sufficiently favorable benefit-risk profile that it ought to be made available generally to physicians and their patients.

C. The Routine Presence Of Punitive Damage Counts And The Absence Of Standards Have Particularly Undesirable Consequences For Pharmaceutical Product Liability Litigation.

Despite the societal judgment that a drug should be marketed, the inevitability of injury assures that pharmaceutical manufacturers will be repeated targets of personal injury actions. And while extensive federal oversight and the standards of the health-care industry can be expected to ensure that the sort of reprehensible con-

while preserving appropriate guarantees for safety and effectiveness.” The agency recognized that “physicians and patients are generally willing to accept greater risks or side effects from products that treat life-threatening and severely-debilitating illnesses, than they would accept from products that treat less serious diseases.” FDA, “Investigational New Drug, Antibiotic, and Biological Drug Product Regulations; Procedures for Drugs Intended To Treat Life-Threatening and Severely Debilitating Illnesses,” 53 Fed. Reg. 41516 (Oct. 21, 1988).

²⁶ *FDA Approval Process, supra*, at 31. This report provides examples of delays in the approval of important cardiovascular, neurological, respiratory, gastrointestinal, cancer, and other drugs. See *id.* at 35-51.

duct meriting punitive damages will be rare,²⁷ plaintiffs' lawyers apparently feel otherwise.²⁸ In fact, punitive damage counts have become a routine feature of complaints against pharmaceutical manufacturers.²⁹

The mere presence of punitive damage counts has a pernicious effect on the entire course of drug product liability litigation. As is true with respect to many other industries, these counts are only rarely dismissed on summary judgment and typically survive to trial. Punitive damage claims therefore have caused dramatic rises in settlement costs and in litigation costs generally for pharmaceutical manufacturers. The unique nature of pharmaceutical litigation, however, gives rise to especially undesirable consequences from punitive damage claims in lawsuits involving these products.

For example, drug product liability cases raise complex medical questions that are extraordinarily difficult for lay juries to resolve, guided as they are only by their common sense and the opposing testimony of experts retained by the parties. Juries in pharmaceutical cases are

²⁷ See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840-841 (2d Cir. 1967) ("A manufacturer distributing a drug to many thousands of users under government regulation scarcely requires this additional measure [i.e., punitive damages] for manifesting social disapproval and assuring deterrence.") (Friendly, J.).

²⁸ See generally P. Huber, *Liability: The Legal Revolution and Its Consequences* 129 (1988) ("Before long, juries were levying punitive damages, ostensibly grounded in outrageous misconduct, for acts that federal regulators had specifically contemplated and approved.").

²⁹ A review of reported pharmaceutical product liability cases reveals the following. During the period 1970-1979, claims for punitive damages are reflected in six decisions, fewer than one per year. During the next five years (through 1984), 17 such decisions have been found, a six-fold increase. This number has more than doubled again to 35 reported decisions during the period 1985-1988, an incidence approximately 15 times greater than in the 1970s.

therefore particularly susceptible to being "unfairly influenced" in their determination of liability for (and the amount of) compensatory damages by "irrelevant and prejudicial factors" relating solely to punitive damages.³⁰ In addition, the inevitability of injury—which is generally well-documented in the pharmaceutical manufacturer's files³¹—may be regarded by the jury as evidence of obduracy or even malice on the part of the defendant, increasing the likelihood that punitive damages may be awarded.³²

While the harm resulting from a single excessive punitive damage award is a serious concern, the nature of the pharmaceutical industry is such that, as a matter of course, manufacturers face multiple claims for punitive damages from the same product. The unavoidably unsafe nature of pharmaceutical products and the large numbers of persons who use these products predictably result in numerous lawsuits with respect to any particular drug. The manufacturer may therefore be exposed to "potentially ruinous"³³ multiple punitive damage claims arising out of what is essentially a single course of conduct. These claims arise in many different states and are subject to decision under many different legal standards.

³⁰ H.R. Rep. 908, 99th Cong., 2d Sess., pt. 1, at 28 (1986) [hereinafter cited as *House Vaccine Report*]. Congress has therefore recently provided for trifurcated trials in cases involving certain childhood vaccines administered after October 1, 1988. See 42 U.S.C. § 300aa-23 (trials conducted in three stages: liability, general damages, and punitive damages).

³¹ Manufacturers must develop and retain extensive information on drug adverse events. See 21 C.F.R. §§ 312.32-312.33, 314.80.

³² See P. Huber, *supra*, at 120 (Manufacturers have come to be regarded as "close to malevolent in their callousness: They *knew* accidents like this were going to happen, but they still declined to take measures needed to prevent the latest one.") (emphasis in original).

³³ Jeffries, "A Comment on the Constitutionality of Punitive Damages," 72 Va. L. Rev. 139 (1986).

More than twenty years ago, Judge Friendly first described the "legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs" in pharmaceutical litigation.³⁴ The lower courts have failed to agree on any coherent solution to these "staggering"³⁵ difficulties. While this case does not present the multiple-claimant problem as starkly as it arises in drug product liability actions, we urge that the Court's development of standards under the Due Process Clause must take into account the special dangers inherent in such a situation.

* * * *

In summary, the nature of the pharmaceutical industry makes punitive damages singularly inappropriate as well as particularly burdensome. At every step of the drug research and development process, a balance must be struck between unavoidable risks and health-care benefits.³⁶ The balance is struck in the first instance by the manufacturer, is subject to careful scrutiny and *de novo* determination by an expert regulatory body, and is then individualized for each patient by the prescribing physician.

Private investment decisions totaling billions of dollars annually and directly affecting the quality and cost of health care in this nation rest on how this balance is struck. Excessive, routine punitive damage claims and standardless awards—stripped from their historical con-

³⁴ *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

³⁵ *Id.*

³⁶ See, e.g., *FDA Approval Process*, *supra*, at 51:

It must be remembered that all drugs have serious potential side effects and all drugs are capable of serious harm if misused or abused. Therefore, safety is relative and both patients and regulators must assume some risk. Levels of public expectations and regulatory goals must be modified to appreciate the necessary balancing of benefits and risks in advancing new and effective drug therapies.

text of punishing rare, outrageous conduct—skew the balance by introducing a wild card: the possibility that multi-million dollar penalties might be imposed by lay juries for perfectly lawful conduct involving beneficial medicines. As we discuss below, the distortion introduced by "skyrocketing" punitive damage claims and awards has deprived patients of significant existing therapies and has inhibited research and development concerning new therapies.³⁷

II. STANDARDLESS PUNITIVE DAMAGE AWARDS AND CLAIMS HAVE ADVERSELY AFFECTED THE AVAILABILITY AND DEVELOPMENT OF PHARMACEUTICAL THERAPIES.

A recent report of the AMA Board of Trustees found that the system for determining liability, of which punitive damages is a significant part, is "having a profound negative impact on the development of new medical technologies."³⁸ The report continued:

Innovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks.³⁹

An FDA expert advisory panel,⁴⁰ the American Academy

³⁷ *Browning-Ferris*, *supra*, 109 S. Ct. at 2924 (O'Connor, J., concurring in part and dissenting in part).

³⁸ *AMA Report*, *supra*, at 1. Although the Board of Trustees did not focus exclusively upon the punitive damages component of the liability system, there is no question that punitive damages play a major role in causing the "negative impact" on medical technology decreed by the Board in its report.

³⁹ *Id.*

⁴⁰ FDA, "Biological Products: Bacterial Vaccines and Toxoids; Implementation of Efficacy Review," 50 Fed. Reg. 51002, 51006

of Pediatrics,⁴¹ the Institute of Medicine,⁴² and commentators⁴³ agree that these concerns have impeded pharmaceutical research and development.

A robust private research effort is desirable not only to discover therapies for presently untreatable diseases, but also to improve upon existing drugs by finding safer and more effective alternatives.⁴⁴ By inhibiting medical research, standardless punitive damages and other liability concerns unduly restrict the physician's armamentarium and consequently the patient's prospects for recovery. These issues have been especially significant with respect to vaccines, contraceptives, and drugs for pregnant women, as we document below.

A. Vaccines

Vaccines, particularly those for childhood diseases, "are one of the great success stories of medicine."⁴⁵ Most

(Dec. 13, 1985) ("attempts to improve vaccines further will be hampered" by tort liability) (report of the Advisory Panel on Review of Bacterial Vaccines and Toxoids).

⁴¹ *Vaccine Injury Compensation: Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 115 (1986) (statement of Dr. Martin H. Smith, President, American Academy of Pediatrics) ("research efforts for new and improved vaccines have been chilled" because of liability concerns).

⁴² Institute of Medicine, *Vaccine Supply and Innovation* 11 (1985) ("apprehensions [concerning liability] are a disincentive to investment in the development of new (or improved) immunizing agents") [hereinafter cited as *Vaccine Supply*]; *id.* at 2 (resolution of liability issues necessary so that "the potential of new technologies [may] be fully realized").

⁴³ *E.g.*, P. Huber, *supra*, ch. 10.

⁴⁴ *See, e.g., id.* at 160-161 ("[N]ewer is generally safer than older in the modern technological world. * * * There is hardly a product in use today [including drugs and vaccines] that is not many times safer than its counterpart of a generation or even a decade ago").

⁴⁵ *AMA Report, supra*, at 6. *See also, e.g., House Vaccine Report, supra*, pt. 1, at 4 (childhood immunization is "one of the most

domestic manufacturers, however, have stopped producing and distributing childhood vaccines.⁴⁶ More than half of the vaccine producers licensed in 1968 have ceased production,⁴⁷ and this country is now "heavily dependent on sole suppliers" for many pediatric vaccines.⁴⁸ The primary cause of this precipitous decline in our vaccine production capacity has been "the liability situation and its consequences (i.e., litigation costs or difficulty in obtaining insurance coverage)."⁴⁹

The vaccine liability crisis is well-established. There are hundreds of suits pending, with damage claims, including punitive damages, totaling several billion dollars.⁵⁰ This figure is more than 10 times the annual

spectacularly effective public health initiatives this country has ever undertaken," having "prevented thousands of children's deaths each year" and saved "[b]illions of medical and health-related dollars").

⁴⁶ *See, e.g., id.* In addition, foreign manufacturers are reluctant to enter the United States market because of liability concerns. *See, e.g., Vaccine Supply, supra*, at 5.

⁴⁷ *Id.* at 46.

⁴⁸ *Id.* at 5. *See also House Vaccine Report, supra*, pt. 1, at 7 ("Currently, there is only one manufacturer of the polio vaccine, one manufacturer of the measles, mumps, rubella (MMR) vaccine, and two manufacturers of the [pertussis] vaccine").

⁴⁹ *Vaccine Supply, supra*, at 11.

⁵⁰ *See, e.g., Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, "Childhood Immunizations, 99th Cong., 2d Sess. 85-86. An illustrative case is *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986). There, a jury awarded the plaintiff \$10 million in damages, including \$8 million in punitive damages, for injuries arising out of administration of the Sabin live-virus polio vaccine. The basis for the complaint was that use of the Salk killed-virus vaccine rather than the Sabin vaccine would have prevented the plaintiff's injury. The enormous punitive damage award was imposed, notwithstanding the conclusion of federal public health experts and other medical authorities that the Sabin vaccine is superior and the manufacturer's reliance on governmental immunization initiatives recom-

sales for the entire vaccine industry.⁵¹ In short, routine punitive damage claims require manufacturers "to engage in a gamble with very large financial stakes. * * * The only way to eliminate the risk is to stop manufacturing the vaccine."⁵² As discussed above, that is precisely what most manufacturers have done.⁵³

mending the production and use only of the Sabin vaccine. The judgment ultimately was set aside on appeal, but only by the narrowest of margins in the Supreme Court of Kansas (4-3). The fact that a punitive damage claim could seriously be entertained in these circumstances, much less survive through trial and virtually through appeal as well, is clear evidence of the liability risks and litigation costs that are borne by vaccine manufacturers as a result of the lack of ascertainable standards governing imposition of punitive damages.

⁵¹ See *Vaccine Supply*, *supra*, at 45-46. See also P. Huber, *supra*, at 166-167 ("In 1986, a new claim was being filed against the manufacturers of whooping cough vaccine every week; one former manufacturer faced 100 suits demanding more than \$2 billion in compensation, or 200 times the total annual sale revenues of the vaccine.").

⁵² *Vaccine Supply*, *supra*, at 10, 117-118.

⁵³ Congress recently acted to establish a compensation system for persons injured by certain childhood vaccines. See National Childhood Vaccine Injury Act of 1986, as amended, 42 U.S.C. §§ 300aa-1 *et seq.* Under this system, persons dissatisfied with a no-fault award from a compensation fund may reject the award and sue the manufacturer, but punitive damages may not be awarded in the absence of proof that the manufacturer wrongfully withheld information from FDA or engaged in similar unlawful conduct. 42 U.S.C. § 300aa-23(d)(2). Congress expressly found that punitive damages should not otherwise be imposed:

Where a manufacturer has attempted in good faith to comply with a government standard—even if the standard provides inadequate protection to the public—the manufacturer should not be assessed punitive damages absent evidence that it engaged in reprehensible behavior that directly resulted in the [initial or continued approval of the vaccine].

House Vaccine Report, *supra*, pt. 1, at 28. While salutary, this development is unfortunately of limited utility. It covers only a small number of vaccines, and even as to those it applies only to claims arising out of administrations after October 1, 1988. The

Most recently, the manufacturer of the vaccine for Japanese encephalitis ceased distribution because it could not obtain "appropriate liability insurance, and there was no statutory mechanism for absolving it of liability."⁵⁴ The unavailability of the vaccine put Americans traveling to certain areas of Asia at increased risk for this disease.

B. Contraceptives And Drugs For Pregnant Women

The adverse impact of excessive punitive damage claims and awards also has been keenly felt by manufacturers of contraceptives and drugs for pregnant women. A recent study by the National Research Council and the Institute of Medicine concluded that product liability concerns "have contributed significantly to the climate of disincentives for the development of contraceptive products."⁵⁵ The study emphasized in particular the "unpredictable nature of litigation" and the failure of the courts to give sufficient weight to "evidence of compliance with FDA regulations."⁵⁶

The AMA also has documented the dramatic drop in basic research in this area:

In the early 1970s, there were 13 pharmaceutical companies actively pursuing research in contraception and fertility. Now, only one US company conducts contraceptive and fertility research. Unless the liability laws are drastically altered, it is very

statute does not and was not intended to address the larger constitutional issues concerning the award of punitive damages in pharmaceutical cases.

⁵⁴ Marcus, "Liability for Vaccine-Related Injuries," 318 N. Eng. J. Med. 191 (1988).

⁵⁵ National Research Council & Institute of Medicine, *Developing New Contraceptives—Obstacles and Opportunities* 141 (L. Mastroianni, *et al.*, eds. 1990).

⁵⁶ *Id.*

unlikely that pharmaceutical companies will aggressively pursue research in this area.⁵⁷

Another study confirms that private domestic research expenditures on contraceptives declined by 90% in the decade following their peak in 1973, and that "no truly new contraceptive chemical entities have been introduced since 1968."⁵⁸ Innovation also has virtually ceased with respect to drugs for use by pregnant women, again because of liability concerns.⁵⁹

The observation that "punitive damages are out of control"⁶⁰ is perhaps nowhere as apt as in these areas. In *Wooderson v. Ortho Pharmaceutical Corp.*,⁶¹ for example, the plaintiff was awarded \$4.75 million in damages, including \$2.75 million in punitive damages, for kidney damage alleged to have been caused by an oral contraceptive. The award was upheld, even though the FDA had expressly refused to approve the addition of a warning because of the lack of scientific evidence supporting causation and the defendant could have been in violation of federal law had it done so.⁶²

The loss of valuable therapies as a result of punitive damages and other liability concerns is particularly striking in the case of Bendectin, an anti-nausea medication useful for pregnant women. Notwithstanding the "nearly universal consensus" that Bendectin does not cause birth defects,⁶³ the manufacturer was besieged by lawsuits and

⁵⁷ *AMA Report, supra*, at 9.

⁵⁸ P. Huber, *supra*, at 155.

⁵⁹ *See id.*

⁶⁰ Jeffries, *supra*, 72 Va. L. Rev. at 139.

⁶¹ 235 Kan. 387, 681 P.2d 1038, *cert. denied*, 469 U.S. 965 (1984).

⁶² *See* Brief Amicus Curiae of the PMA in Support of Petition for a Writ of Certiorari, No. 84-290, at 14-19.

⁶³ *Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799, 803 (D.D.C. 1986), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 218 (1989). Following public hearings and an extensive

ultimately ceased distribution of the product in 1983.⁶⁴ Punitive damage claims have been a routine part of Bendectin litigation, and jury awards of such damages are disconcertingly common, while the judicial response has been inconsistent.⁶⁵ The litigation surrounding Ben-

review of the evidence, FDA's Fertility and Maternal Health Drugs Advisory Committee—an independent expert panel composed of physicians, scientists and a consumer representative, and advised by scientists from the National Institutes of Health—concluded in 1980 that there is no increased incidence of birth defects resulting from exposure to Bendectin. FDA announced its agreement with this finding, and the agency has stood by it ever since. *See id.*

When the scientific studies have been presented dispassionately at trial, untainted by the understandably moving evidence of the children's birth defects or by evidence purportedly going to punitive damages, the jury has determined that Bendectin does not cause birth defects. *See In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 788 (1989) (in 22-day trifurcated trial of more than 800 consolidated cases, solely on the issue of causation, jury concluded that plaintiffs had not established that Bendectin is a proximate cause of human birth defects).

⁶⁴ *See, e.g., Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 218 (1989).

⁶⁵ For example, the jury in *Ealy v. Richardson-Merrell, Inc.*, No. 83-3504 (D.D.C. Oct. 1, 1987), awarded \$75 million in punitive damages, which the district court remitted in its entirety because of the lack of any evidence of wrongful conduct on the part of the defendant. The court of appeals in *Ealy* subsequently held that judgment n.o.v. should have been granted to the manufacturer with respect to liability for both compensatory damages and punitive damages. *Ealy v. Richardson-Merrell, Inc.*, 897 F.2d 1159 (D.C. Cir. 1990). Other trial courts, however, have upheld punitive damage awards in Bendectin cases. *See Blum v. Merrell Dow Pharmaceuticals, Inc.*, 1 Pa. D. & C. 4th 634 (Penn. Ct. of Common Pleas 1988), *rev'd in part and aff'd in part*, 385 Pa. Super. 151, 560 A.2d 212 (1989); *Brock v. Merrell Dow Pharmaceuticals, Inc.*, No. L-83-148-CA (E.D. Tex. Mar. 4, 1988), *rev'd*, 874 F.2d 307, *mod.*, 884 F.2d 166, *reh'g denied*, 884 F.2d 167 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1511 (1990). Trial on the issue of punitive damages in another Bendectin case has been postponed pending this Court's decision here. *See Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, No. 1245-82 (D.C. Super. Ct. Apr. 19, 1990).

dectin has ill-served the patient population. As the American College of Obstetricians and Gynecologists concluded, the loss of Bendectin "creates a significant therapeutic gap" for the treatment of pregnant women, and in its absence "severe cases [of nausea and vomiting during pregnancy] have led to serious maternal nutritional as well as other deficiencies." ⁶⁶

C. Other Drug Products

Many other drug products have been the subject of standardless multi-million dollar punitive damage awards and routine claims for such amounts. These cases confirm the lessons from the products already discussed: punitive damages are imposed on facts far removed from what historically was required for such extraordinary awards, they distort incentives for research and development, and they ultimately deprive patients of significant pharmaceutical therapies.

In a case involving the widely-prescribed anti-coagulant drug Coumadin (warfarin sodium), for example, a jury awarded more than \$26 million in punitive damages for injuries resulting from a necrotic reaction, a rare and unavoidable side effect.⁶⁷ Although the FDA-approved package insert warned of necrosis, the plaintiff argued that the warning should have been more specific and that additional reports should have been made to the agency. The plaintiff further suggested to the jury a formula for determining punitive damages, amounting to 20-30 cents per day for each person purportedly at risk for the reaction as a result of Coumadin therapy during the years 1965 through 1977. The \$26 million punitive damage award, which the trial court later remitted to \$13 mil-

⁶⁶ *AMA Report, supra*, at 11 (citation omitted).

⁶⁷ *Chelos v. Endo Laboratories, Inc.*, No. 87-0113 (Ill. App.). The case was settled on confidential terms before argument in the Appellate Court.

lion, fell within the range resulting from reliance on the plaintiff's formula.

The threat of punitive damage awards adversely affects the availability of important new therapies even where no awards involving a particular product actually have been entered. For example, distribution of the drug botulinum, the only available treatment for certain eye conditions, was temporarily halted during clinical investigations as a result of liability concerns.⁶⁸ Similarly, small biotechnology firms, which often are at the cutting edge of innovation, have reported that product liability issues have a significant, untoward impact on decisions concerning research and commercial development of new products.⁶⁹

III. CONSTITUTIONAL STANDARDS CIRCUMSCRIBING THE AWARD OF PUNITIVE DAMAGES ARE NECESSARY.

While the case before the Court may appear far removed from the context of pharmaceutical product liability litigation, the Court's decision will undoubtedly have a significant effect on this litigation. A refusal to undertake demanding constitutional scrutiny of punitive damage awards under the Due Process Clause would send precisely the wrong message: that pharmaceutical manufacturers are fair game for whatever multi-million dollar awards can be coaxed from sympathetic juries or

⁶⁸ See *AMA Report, supra*, at 11. The product ultimately was approved for commercial distribution.

⁶⁹ See *id.* The loss of beneficial products can occur without actually driving a particular manufacturer entirely out of business. It is enough if the threat or award of punitive damages causes a defendant to abandon a particular product or class of products. If an important pharmaceutical therapy is lost, it does not matter whether it is lost because punitive damages have ruined a small producer or have caused a larger company to abandon the product or area in favor of less risky avenues of research and development. In either case, the negative impact on the public health is the same.

pried from defendants in settlement. That message has been sent repeatedly by the lower courts. Should it receive this Court's imprimatur, the distorting effect of excessive punitive damages will be substantially increased.⁷⁰ The predictable result will be needless losses to patients, as beneficial therapies are withdrawn from the market and pharmaceutical research and development expenditures are directed toward other areas.

Amici suggest that the constitutional standards enunciated by the Court in this case should take account of three issues particularly relevant to the pharmaceutical industry. These concerns are directly pertinent to the protections "against arbitrary action of government" embodied in the Due Process Clause.⁷¹

First, punitive damage awards are arbitrary and excessive, in violation of the Due Process Clause, when they are awarded for conduct that not only is lawful, but was specifically approved in advance by the responsible government agency. Under this principle, unusually close constitutional scrutiny is appropriate in the pharmaceutical field because the defendant has engaged in lawful conduct approved by an expert regulatory body. Absent clear proof that the defendant committed an unlawful act in regard to obtaining FDA approval, which was material to the harm in question, any punitive damage award is improper in relation to the conduct of the

⁷⁰ The need for guidance under the Due Process Clause is particularly important in light of the Court's decision last Term in *Browning-Ferris* that the Eighth Amendment does not apply to punitive damage awards. The Court was careful to note in that case that it was not foreclosing due process challenges to such awards. See *Browning-Ferris*, *supra*, 109 S. Ct. at 2921; *id.* at 2923 (Brennan, J., concurring); *id.* at 2924 (O'Connor, J., concurring in part and dissenting in part).

⁷¹ *Browning-Ferris*, *supra*, 109 S. Ct. at 2923 (Brennan, J., concurring) (citation omitted).

pharmaceutical manufacturer in placing an approved drug on the market.⁷²

Second, punitive damage awards are arbitrary when they discourage basic pharmaceutical research and lead to the withdrawal of beneficial therapies. Each individual award must be assessed in this light to protect the interests of all patients. Substantive standards and procedural safeguards are required to ensure that juries and judges do not render and approve inappropriate punitive damage awards. It would be useful, for example, to require more detailed guidance in jury instructions than was provided in this case;⁷³ to impose a heightened burden of proof, such as clear and convincing evidence, for the award of punitive damages;⁷⁴ and to bifurcate trials, with proceedings on punitive damages conducted separately from issues pertaining to basic liability and the amount of compensatory damages.⁷⁵ Appropriate general standards under the Due Process Clause are discussed in the brief of *amici* United States Chamber of Commerce *et al.*

⁷² Five states have enacted defenses to punitive damages for pharmaceutical manufacturers that have complied with relevant FDA approval and reporting requirements. See Ariz. Rev. Stat. § 12-701; N.J. Stat. Ann. § 2A:58C-5(c); Ohio Rev. Code Ann. § 2307.80; Or. Rev. Stat. § 30.927; Utah Code Ann. § 78-18-2. There is a similar federal defense in cases arising out of administration of childhood vaccines. See 42 U.S.C. § 300aa-23(d)(2); note 53, *supra*.

⁷³ See *Browning-Ferris*, *supra*, 109 S. Ct. at 2923 (Brennan, J., concurring) (criticizing "skeletal guidance" to jurors that amounts to "little more than an admonition to do what they think is best"); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (a "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process").

⁷⁴ *Cf. Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring proof by clear and convincing evidence in civil custody proceedings).

⁷⁵ *Cf. 42 U.S.C. § 360aa-23* (requiring trifurcated trials, with separate proceedings on liability, the amount of compensatory damages and the amount of punitive damages, in vaccine cases).

Third, where a single product or course of conduct may give rise to multiple claims for punitive damages, particularly careful judicial scrutiny is required.⁷⁶ Pharmaceutical manufacturers are especially vulnerable to such multiple claims because their products are used by thousands or millions of patients, and injuries to some of them are unavoidable.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

Of Counsel:

BRUCE J. BRENNAN
EDWIN C. MULCAHY
LORETTA E. CHI
PHARMACEUTICAL MANUFACTURERS
ASSOCIATION
1100 Fifteenth Street, N.W.
Washington, D.C. 20005

KIRK B. JOHNSON
MARTIN F. HATLIE
AMERICAN MEDICAL ASSOCIATION
535 North Dearborn
Chicago, Illinois 60610

May 31, 1990

RICHARD F. KINGHAM
(Counsel of Record)
BRUCE N. KUHLIK
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for the Amici Curiae

⁷⁶ See *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989). The court granted a motion for reconsideration of this decision with respect to the remedy that had been fashioned, but it adhered to "its previous ruling that repetitive awards of punitive damages for the same conduct violate a defendant's due process rights." *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234 (D.N.J. 1989).

(6)
No. 89-1279

Supreme Court, U.S.

FILED

MAY 31 1990

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

**BRIEF OF THE NATIONAL ASSOCIATION
OF MUTUAL INSURANCE COMPANIES
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

FORREST S. LATTA
(Counsel of Record)
BARKER & JANECKY, P.C.
Post Office Box 2987
Mobile, Alabama 36652
(205) 432-8786

GEOFFREY C. HAZARD, JR.
YALE LAW SCHOOL
401A Yale Station
New Haven, Connecticut 06520
(203) 432-4971

*Attorneys for Amicus Curiae
National Association of
Mutual Insurance Companies*

June 1, 1990

QUESTION PRESENTED

Amicus Curiae will address the following question:

Whether Due Process requires, as a predicate to awarding substantial punitive damages against a principal, an intelligible legal standard for attributing an agent's misconduct to the principal.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. IMPOSITION OF SUBSTANTIAL PUNITIVE DAMAGES BY ATTRIBUTION—FOR EXAM- PLE ATTRIBUTION TO A CORPORATION OF AN EMPLOYEE'S CONDUCT—IS A RE- CENT PHENOMENON	3
II. ATTRIBUTION OF SUBSTANTIAL PUNI- TIVE DAMAGES ON THE BASIS OF UNIN- TELLIGIBLE STANDARDS EXPOSES COR- PORATIONS TO FUNDAMENTAL UNFAIR- NESS	8
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	Page
<i>American Pioneer Life Ins. Co. v. Sandlin</i> , 470 So.2d 657 (Ala. 1985)	7, 8, 9
<i>American Society of Mechanical Engineers v. Hydrolevel Corp.</i> , 456 U.S. 556 (1982)	6
<i>The Amiable Nancy</i> , 16 U.S. (3 Wheat.) 546 (1818)	6
<i>Avondale Mills v. Bryant</i> , 10 Ala.App. 507, 63 So. 932 (1913)	6
<i>Bankers Life Ins. Co. v. Scurlock Oil Co.</i> , 447 F.2d 997 (5th Cir. 1971)	6
<i>Case v. Hulsebush</i> , 122 Ala. 212, 26 So. 155 (1899)	6
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	11
<i>Continental Electric Co. v. American Employers Insurance Co.</i> , 518 So.2d 83 (Ala. 1987)	9
<i>Giacino v. Pennsylvania</i> , 382 U.S. 399 (1966)	10
<i>HealthAmerica et al. v. Menton</i> , 551 So.2d 235 (Ala. 1989)	7
<i>Lake Shore & S.M. Ry. Co. v. Prentice</i> , 147 U.S. 101 (1893)	5, 8
<i>Land & Assoc., Inc. v. Simmons</i> , [1989 WL 162213] — So.2d — (Ala. 1989)	7
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	8
<i>Louis Pizitz Dry Goods Co. v. Yeldell</i> , 274 U.S. 112 (1927)	6, 10
<i>McManus v. Crickett</i> , 1 East. 105, 102 Eng. Rep. 43 (1800)	3
<i>National Sec. Fire & Cas. Co. v. Bowen</i> , 447 So.2d 133 (Ala. 1983)	7, 8
<i>Parris v. St. Johnsbury Trucking Co.</i> , 395 F.2d 543 (2nd Cir. 1968)	6
<i>Richmond & D.R.R. v. Freeman</i> , 97 Ala. 289, 11 So. 800, 801 (1892)	10
<i>Roginsky v. Richardson-Merrill</i> , 378 F.2d 832 (2nd Cir. 1967)	6
<i>State v. Spurlock</i> , 393 So.2d 1052 (Ala. Crim. App. 1981)	7

TABLE OF AUTHORITIES—Continued

	Page
<i>Williams v. City of New York</i> , 508 F.2d 356 (2nd Cir. 1974)	6
<i>Union Ins. Co. v. Hoge</i> , 62 U.S. 35 (1859)	11
TREATISES	
Couch on Insurance 2d (Rev. ed. 1984)	11
Ghiardi & Kircher, Punitive Damages Law and Practice (1985)	5
Harper, James & Gray, The Law of Torts (2nd ed. 1986)	3
Keeton, Dobbs, Keeton & Owen, Prosser & Keeton on The Law of Torts (5th ed. 1984)	3
Perkins, Criminal Law (2nd ed. 1969)	7
Prosser, Handbook of the Law of Torts (4th ed. 1971)	3
LAW REVIEWS	
Comment, <i>Corporate Vicarious Liability for Punitive Damages</i> , 1985 B.Y.U.L. Rev. 317, 318 (1985)	4, 5
Elliott, <i>Why Punitive Damages Don't Deter Corporate Misconduct Effectively</i> , 40 Ala. L. Rev. 1053 (1989)	4
Ellis, <i>Punitive Damages, Due Process, and the Jury</i> , 40 Ala. L. Rev. 975 (1989)	4
Ellis, <i>Fairness and Efficiency in the Law of Punitive Damages</i> , 56 So. Cal. L. Rev. 1 (1982)	3, 11
Holmes, <i>Agency</i> , 4 Harv. L. Rev. 345 (1891)	3
Laski, <i>The Basis of Vicarious Liability</i> , 26 Yale L.J. 105 (1916)	3
Nettles & Latta, <i>Alabama's Wrongful Death Statute: A Problematic Existence</i> , 40 Ala. L. Rev. 475 (1989)	10
Note, <i>Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction</i> , 92 Harv. L. Rev. 1227 (1979)	4
Owen, <i>Punitive Damages in Products Liability Litigation</i> , 74 Mich. L. Rev. 1257 (1976)	4

TABLE OF AUTHORITIES—Continued

	Page
Parlee, <i>Vicarious Liability for Punitive Damages: Suggested Changes in the Law Through Policy Analysis</i> , 68 Marq. L. Rev. 27 (1984)	4
Priest, <i>Punitive Damages and Enterprise Liability</i> , 56 So. Cal. L. Rev. 123 (1982)	4
Sykes, <i>The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines</i> , 101 Harv. L. Rev. 563 (1988)	4
Wigmore, <i>Responsibility for Tortious Acts: Its History</i> , 7 Harv. L. Rev. 383 (1894)	3
OTHER AUTHORITIES:	
42 U.S.C. § 1983	11
Model Penal Code § 2.07 (1) (1985)	5
Restatement (Second) of Agency § 217 C (1958)	5
Restatement (Second) of Torts § 909 (1977)	5

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

**BRIEF OF THE NATIONAL ASSOCIATION
OF MUTUAL INSURANCE COMPANIES
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

INTEREST OF THE AMICUS CURIAE¹

The National Association of Mutual Insurance Companies ("NAMIC") consists of more than 1,200 companies that underwrite insurance of all types in every jurisdiction in the United States. Founded in 1895, NAMIC assists its members in providing a financially stable, competitive private insurance market for the consuming public.

Insurance is marketed through widely various and often remote business relationships. NAMIC members are increasingly confronted with substantial punitive dam-

¹ The parties' letters of consent to this brief have been lodged with the clerk.

ages claims based solely upon theories of vicarious attribution, similar to the claim in this case. *Amicus* believes there are valid constitutional objections where the nexus between the active tortfeasor and a principal defendant is too remote to justify imposition of substantial punitive damages by attribution.

Amicus therefore asks that the Court in this case be mindful of the serious problems resulting in unjustified attribution of substantial punitive damages, and articulate a standard in this respect that is compatible with notions of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The unfairness of unconstrained jury discretion to award punitive damages in a civil lawsuit is compounded where such damages are imposed against a principal for the wrongdoing of an agent in the absence of any intelligible legal standards for attribution. The rule of attribution applied in this case originated historically as an extension of the *respondeat superior* doctrine from a basis for compensatory damages to a predicate for punitive damages. Unfortunately, no satisfactory rationale for attribution of punitive damages has been articulated in scholarly discussion or judicial decision, including the Alabama decisions on the subject. Few courts have paused to consider the fundamental differences between compensatory and punitive damages. Until recently, the rule of attribution resulted in few punitive damages awards of any significance. The substantial increase in large punitive damages awards during the last ten years, however, warrants careful examination of this problem and the articulation of intelligible standards for attribution that comport with Due Process.

ARGUMENT

Amicus adopts petitioner's argument that Due Process prohibits the imposition of substantial punitive damages in the absence of standards or limits governing the discretion of the decisionmaker, judge or jury. This unfairness is compounded where such damages are imposed against a principal in the absence of any intelligible standards for attribution of an agent's misconduct.

I. IMPOSITION OF SUBSTANTIAL PUNITIVE DAMAGES BY ATTRIBUTION—FOR EXAMPLE ATTRIBUTION TO A CORPORATION OF AN EMPLOYEE'S CONDUCT—IS A RECENT PHENOMENON.

While legal historians differ on the origins of vicarious liability in Anglo-American law, *see* Harper, James & Gray, *The Law of Torts*, § 26.2 (2nd ed. 1986); Laski, *The Basis of Vicarious Liability*, 26 Yale L.J. 105 (1916); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 383 (1894); Holmes, *Agency*, 4 Harv. L. Rev. 345 (1891), it is generally accepted that until the Sixteenth Century a master was not liable for a servant's tort unless the master authorized the wrongful act. Prosser, *Handbook of the Law of Torts*, § 2 (4th ed. 1971).

By 1800, Lord Kenyon held that while a servant's negligence within the course of employment could be attributed to the master for compensatory liability, the master could not be liable for punitive damages (trespass) where the servant wilfully disobeyed the master's orders. *McManus v. Crickett*, 1 East. 105, 102 Eng. Rep. 43 (1800). Modern-day vicarious liability is rooted in the policy of compensating victims for torts committed by servants in the course of their masters' employment. Although its legal rationale is still arguable, *see* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1 (1982), vicarious liability for compensatory damages is now uniformly accepted. Keeton, Dobbs, Keeton

& Owen, Prosser & Keeton on The Law of Torts, pp. 499-508 (5th ed. 1984). See also, Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L.Rev. 563 (1988).

During the late Nineteenth Century, many American jurisdictions extended the rule of attribution to impose punitive damages upon principals for tortious misconduct of agents or employees. Few courts paused to consider the distinction between compensatory and punitive damages, or the policy considerations that could justify punitive damages. No fully satisfactory rationale for vicarious attribution of punitive damages has been articulated in judicial or scholarly discussion. See, e.g., Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala.L.Rev. 975, 980 (1989); Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala.L.Rev. 1053, 1068 (1989); Parlee, *Vicarious Liability for Punitive Damages: Suggested Changes in the Law Through Policy Analysis*, 68 Marq. L. Rev. 27, 28 (1984); Priest, *Punitive Damages and Enterprise Liability*, 56 So.Cal. L.Rev. 123, 123-24 (1982); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich.L.Rev. 1257, 1299-1301 (1976); Comment, *Corporate Vicarious Liability for Punitive Damages*, 1985 B.Y.U.L.Rev. 317, 318 (1985). Cf. Note, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 Harv.L.Rev. 1227, 1247-51 (1979).

The want of a satisfactory rationale may explain the sharp division among American jurisdictions over the proper standard for attribution. Some states have simply extended the *respondeat superior* rule to encompass punitive damages for tortious acts committed by employees in the course of their employment, making no distinction between compensatory and punitive damages in attributing liability to the principal. The degree of a principal's involvement is immaterial. Other jurisdictions, now con-

stituting a majority,² follow the "complicity" rule formulated by the American Law Institute. See Restatement (Second) of Torts § 909 (1977).³ Under that rule, attribution of punitive damages is limited to torts committed, authorized or ratified by a "managerial agent," or torts committed by an unfit employee who was recklessly employed or retained. Accord Restatement (Second) of Agency § 217 C (1958); Model Penal Code § 2.07(1) (1985).

In the federal sphere, this Court adopted the complicity rule in *Lake Shore & S.M. Ry. Co. v. Prentice*, 147 U.S. 101 (1893), wherein it stated:

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton oppressive or malicious intent on the part of the agent. This is clearly shown by the judgment of this court

² See Comment, *Corporate Vicarious Liability for Punitive Damages*, 1985 B.Y.U.L.Rev. 317, 318 (1985) (showing the number of states adhering to each rule). Accord, Ghiardi & Kircher, *Punitive Damages Law and Practice* § 24.01 at 2 (1985).

³ Section 909. Punitive Damages Against a Principal

Punitive damages may properly be awarded against a master or other principal because of an act by an agent if, but only if,

- (a) the principal or a managerial agent authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act.

in the case of *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818).

147 U.S. at 107. The Court in *Lake Shore* further noted that a corporation may be punished for the acts of an agent only where "criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation." *Id.* at 111.

The Court later explained its *Lake Shore* holding as merely adopting the rule of attribution "which it thought most appropriate" and not necessarily establishing a Due Process limitation. *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 115 (1927). The Court has questioned *Lake Shore* in a footnote in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982), but did not overrule it. In *Hydrolevel* the Court upheld a statutory antitrust award of treble damages attributed to a principal under a theory of "apparent authority." The Court recognized the treble damages as having a remedial component designed to counterbalance the "difficulty of maintaining a private suit," and not serving a solely punitive purpose. *Id.* at 575. The decision in *Hydrolevel* therefore is consistent with the complicity rule adopted in *Lake Shore*.⁴

In Alabama, the rule of *respondeat superior* was judicially enlarged near the turn of this century to allow the recovery of punitive as well as compensatory damages. See *Case v. Hulsebush*, 122 Ala. 212, 26 So. 155 (1899); *Avondale Mills v. Bryant*, 10 Ala.App. 507, 63 So. 932 (1913). As in other states, the Alabama Supreme Court appears never to have analyzed the differences between compensatory and punitive damages in connec-

⁴ The complicity rule likewise has been embraced by several federal courts of appeals. See *Williams v. City of New York*, 508 F.2d 356 (2nd Cir. 1974); *Bankers Life Ins. Co. v. Scurlock Oil Co.*, 447 F.2d 997 (5th Cir. 1971); *Parris v. St. Johnsbury Trucking Co.*, 395 F.2d 543 (2nd Cir. 1968); *Roginsky v. Richardson-Merrill*, 378 F.2d 832 (2nd Cir. 1967).

tion with a rule of attribution, nor has it defined any standard of attribution except for the vague requirement that the agent's tort be committed "within the scope of his employment." 63 So. at 934. The most recent statement is found in *HealthAmerica et al. v. Menton*, 551 So.2d 235 (Ala. 1989), where the court in affirming \$1.8 million in punitive damages stated simply, "A corporation is responsible for the acts of its agent." *Id.* at 245-46. As will be shown below, the operative rule of attribution in Alabama civil cases has become "let the jury decide," without sufficient instruction for the factfinder in legal standards for determining whether the principal should be punished.⁵

Until a decade ago, Alabama's rule of attribution resulted in a few punitive damages awards of any significance. Since then, several substantial punitive damages awards have been imposed against insurance companies based solely on grounds of *respondeat superior*. See, e.g., *Land & Assoc., Inc. v. Simmons*, [1989 WL 162213] — So.2d — (Ala. 1989) (\$2.5 million); *HealthAmerica, et al. v. Menton*, 551 So.2d 235 (Ala. 1989) (\$1.8 million); *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657 (Ala. 1985) (\$3 million); *National Sec. Fire & Cas. Co. v. Bowen*, 447 So.2d 133 (Ala. 1983) (\$1.5 million). The recent proliferating phenomenon of substantial punitive damages awards, based upon an indefinite rule of attribution, compels careful examination of this question and the articulation of a rule of attribution that comports with Due Process.

⁵ Alabama applies a much stricter standard of attribution under its criminal law, requiring "either (1) authorization, procurement, incitation or moral encouragement, or (2) the knowledge plus acquiescence of the principal in the acts of his agent" before vicarious criminal liability may be imposed. See *State v. Spurlock*, 393 So.2d 1052, 1059 (Ala.Crim.App. 1981), citing *Perkins*, Criminal Law pp. 812-13 (2nd ed. 1969).

II. ATTRIBUTION OF SUBSTANTIAL PUNITIVE DAMAGES ON THE BASIS OF UNINTELLIGIBLE STANDARDS EXPOSES CORPORATIONS TO FUNDAMENTAL UNFAIRNESS.

Due Process prohibits punishment of persons not adequately shown to be guilty. See *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 115 (1983). This protection extends to civil defendants hoping to protect their property. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Punitive damages implicates the defendant's right to fair punishment rather than plaintiff's interest in fair compensation. The unfairness of punishing a principal for its agent's misconduct is made more acute where, as in this case, the wrong is committed solely for the agent's illicit benefit. A meaningful nexus must be required between the defendant principal and the actual tortfeasor before the latter's misconduct may serve as the predicate for punishment, even under a liberal rule of *respondeat superior*.⁶ The focus must be upon the level of corporate involvement, not solely upon the act of the "agent".

The Alabama Supreme Court has failed to come to grips with this problem. Instead of articulating intelligible standards, it has broadly declared the issue of attribution a "question . . . for the jury." See *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657, 665 (Ala. 1985). As a result, several multi-million dollar punitive damages verdicts have been imposed by juries against insurance companies for the tortious misconduct of persons who had only remote or indirect relationships with the defendant insurer.

For example, in *National Security Fire & Cas. Co. v. Bowen*, 447 So.2d 133 (Ala. 1983), the insurance com-

⁶ Such a nexus is explicit in the "complicity" rule, which requires that the punishable act be committed or authorized by a managerial agent.

pany had an agency relationship with an insurance brokerage, which independently hired two private investigators to determine the cause of a fire loss. There was no evidence of any relationship or communication between the insurance company and the investigators. After a series of outrageous actions by the investigators, the insured sued the insurance company on theories of fraud, malicious prosecution and the tort of outrage. A jury imposed punitive damages in the amount of \$1.5 million. On appeal, the Alabama Supreme Court held that the existence of an agent relationship is simply "a question of fact to be determined by the jury" and "it is quite obvious that the jury believed that a principle-agent relationship existed in this case." 447 So.2d at 138. There was no discussion of intelligible standards or whether the insurance company was guilty of any complicity in the tortious conduct.

Similarly, in *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657 (Ala. 1985), a total stranger to defendant American Pioneer fraudulently induced the plaintiff to purchase an annuity from the company. The "agent" actually was a registered agent of an entirely different insurer at the time of the fraud, and it was undisputed that he did not become licensed by American Pioneer until several months later. 470 So.2d at 665. The jury returned a general verdict against American Pioneer in the sum of \$3 million in punitive damages. On appeal, the Alabama Supreme Court noted that the trial court instructed the jury that it could have found the agent was merely a "broker," rather than an agent. The court then dispensed with the agency question by stating that "there was disputed evidence in the case, so the question was for the jury." *Id.*

Again, in *Continental Electric Co. v. American Employers' Insurance Co.*, 518 So.2d 83 (Ala. 1987), the Alabama Supreme Court reversed a summary judgment which the trial court had granted in favor of the in-

suror on the absence of a sufficient agency relationship. The active tortfeasor was an employee of an insurance agent, hence one step removed from a direct agency relationship. The court held there was sufficient evidence (under a "scintilla" standard) that he was a "subagent" to warrant submission to the jury of the issue of punitive damages against the insurer. The operative rule of attribution was, again, 'let the jury decide.' *Id.* at 89 ("summary judgment on this claim was improper").

In opposition to granting the writ on this issue, respondents have cited *Louis Pizitz Dry Goods Co. v. Yell*, 274 U.S. 112 (1927), where the Court held that Alabama's imposition of liability through punitive damages against an employer in a statutory wrongful death case did not violate Due Process under the Fourteenth Amendment. The *Pizitz* case, however, involved a direct master-servant relationship rather than a questionable agency relationship. More important, the Alabama wrongful death statute, although cast as a punitive remedy, is in substance a compensatory one. See *Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 11 So. 800, 801 (1892); Nettles & Latta, *Alabama's Wrongful Death Statute: A Problematic Existence*, 40 Ala. L. Rev. 475, 485-90 (1989). Where the statutory punitive damages effectuates a compensatory purpose, as in *Pizitz* and *Hydrolevel*, different considerations are involved in attribution than when punitive damages are imposed solely as punishment. Furthermore, *Hydrolevel* involved an express statutory limit of three-fold the compensatory damages.⁷ In contrast, the Alabama law applicable in this case had neither an articulated substantive standard of attribution such as in the Restatement of Torts, nor a proportionate

⁷ Plaintiff in *Pizitz* was represented by then-attorney Hugo L. Black who, perhaps not so coincidentally, later authored *Giacco v. Pennsylvania*, 382 U.S. 399 (1966), holding that federal due process prohibits standardless jury discretion in the imposition of damages.

limitation on punitive damages such as the three-fold standard under the antitrust liability in *Hydrolevel*.

Under any rule of attribution, further unfairness results where the amount of punishment for an agent's misconduct is determined by reference (express or implied) to the innocent principal's size and wealth. Moreover, the financial burden of the punishment ultimately falls primarily upon blameless shareholders, customers, or the public at large. See Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 66 (1982). In the case of mutual insurance companies, it falls directly on the policyholders.⁸ Compare *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), where the Court prohibited attribution of punitive damages against municipalities in claims under 42 U.S.C. § 1983 because of the financial burden placed upon taxpayers.

⁸ Mutual insurance companies, by definition, are owned by their policyholders. See *Union Ins. Co. v. Hoge*, 62 U.S. 35, 64-65 (1859); Couch on Insurance 2d (Rev.ed) § 19:14 (1984).

CONCLUSION

There appears to have been no intelligible standard of attribution applied in the present case, judging from the report of the opinion below. This Court should require, as a matter of Due Process, the articulation of an intelligible legal standard for attribution of an agent's misconduct as a predicate to awarding substantial punitive damages against a principal.

Respectfully submitted,

FORREST S. LATTA
(Counsel of Record)
BARKER & JANECKY, P.C.
Post Office Box 2987
Mobile, Alabama 36652
(205) 432-8786

GEOFFREY C. HAZARD, JR.
YALE LAW SCHOOL
401A Yale Station
New Haven, Connecticut 06520
(203) 432-4971

*Attorneys for Amicus Curiae
National Association of
Mutual Insurance Companies*

June 1, 1990

FILED
MAY 31 1990

JOSEPH P. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN AND EDDIE HALGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF *AMICUS CURIAE*
THE DEFENSE RESEARCH INSTITUTE
IN SUPPORT OF PETITIONER

JOHN CALVIN JEFFRIES, JR.
University of Virginia
Law School
Charlottesville, Virginia 22901
GEORGE CLEMON FREEMAN, JR.*
KYLE E. MCSLARROW
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212
Counsel for Amicus Curiae
Defense Research Institute

Of Counsel:

ARCHIE S. ROBINSON
ROBINSON & WOOD
227 North First Street
San Jose, California 95113
President of the Defense
Research Institute

May 30, 1990

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. UNGUIDED JURY DISCRETION OVER PUNITIVE DAMAGES VIOLATES DUE PROCESS	3
II. THE ALABAMA POST-VERDICT REVIEW DOES NOT CURE THIS DEFICIENCY	9
III. AN APPROPRIATE REMEDY FOR THIS CONSTITUTIONAL DEFICIENCY WOULD BE TO REQUIRE STATE LEGISLATURES TO ADOPT SUITABLE GUIDELINES FOR AWARDING PUNITIVE DAMAGES	11
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:

Page

<i>Aetna Life Ins. Co. v. Lavoie</i> , 470 So.2d 1060 (Ala. 1984), vacated and remanded, 475 U.S. 813 (1986), on remand, 505 So.2d 1050 (Ala. 1987) ..	13
<i>Bankers Life & Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988) ..	6
<i>Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.</i> , 109 S.Ct. 2909 (1989) ..	5, 14, 15
<i>City of Mesquite v. Aladdin's Castle, Inc.</i> , 455 U.S. 283 (1982) ..	6
<i>Connally v. General Construction Co.</i> , 269 U.S. 385 (1926) ..	5
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972) ..	17
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974) ..	7, 14
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) ..	7
<i>H.J. Inc. v. Northwestern Bell Telephone Co.</i> , 109 S. Ct. 2893 (1989) ..	14
<i>Hammond v. City of Gadsden</i> , 493 So.2d 1374 (Ala. 1986) ..	10
<i>Healthamerica v. Menton</i> , 551 So.2d 235 (Ala. 1989), cert. denied, 58 U.S.L.W. 3528 (Feb. 20, 1990) (No. 89-939) ..	12
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983) ..	6
<i>Lassiter v. Dept. of Social Services</i> , 452 U.S. 18 (1981) ..	5
<i>Olympia Spa v. Johnson</i> , 547 So.2d 80 (1989) ..	4
<i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156 (1972) ..	16
<i>Rochin v. California</i> , 342 U.S. 165 (1952) ..	5
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974) ..	6
<i>Solem v. Helm</i> , 463 U.S. 277 (1983) ..	7
<i>United American Insurance Co. v. Brumley</i> , 542 So.2d 1231 (Ala. 1989) ..	12
<i>United States v. Reese</i> , 92 U.S. 214 (1876) ..	9
<i>Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982) ..	6

U.S. STATUTES:

15 U.S.C. § 15(a) (1982) ..	12
18 U.S.C. § 1964(c) (1982) ..	12

TABLE OF AUTHORITIES—Continued

CONSTITUTION:

Page

U.S. Const. amend. VIII ..	4, 5, 7, 16
U.S. Const. amend. XIV ..	passim

MISCELLANEOUS:

Alabama Code § 6-5-410 (1975) ..	4
Alabama Pattern Jury Instructions § 11.03 (1974) ..	4
B. Cardozo, <i>Law and Literature</i> , 101 (1931) ..	17
DRI Monograph, <i>The Case Against Punitive Damages</i> (1969) ..	2
Foot, <i>Vagrancy-Type Law and Its Administration</i> , 104 U. Pa. L. Rev. 603 (1956) ..	16
Freeman, <i>Justice Powell's Constitutional Opinions</i> , 45 Wash. & Lee L. Rev. 411 (1988) ..	7
Freeman and McSlarrow, <i>RICO and the Due Process "Void for Vagueness" Test</i> , 45 Bus. Law 1003 (1990) ..	14
J. Ghiardi and J. Kircher, <i>Punitive Damages</i> , § 21.001 (1984) ..	2
Jeffries, <i>A Comment on the Constitutionality of Punitive Damages</i> , 72 Va. L. Rev. 139 (1986) ..	7
Jeffries, <i>Legality, Vagueness, and the Construction of Penal Statutes</i> , 71 Va. L. Rev. 189 (1985) ..	14
2 F. Pollock & F. Maitland, <i>The History of English Law</i> (2d ed. 1909) ..	12
Wright, <i>Beyond Discretionary Justice</i> , 81 Yale L.J. 575 (1972) ..	14

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN AND EDDIE HALGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

**BRIEF OF *AMICUS CURIAE*
THE DEFENSE RESEARCH INSTITUTE
IN SUPPORT OF PETITIONER**

INTEREST OF *AMICUS CURIAE*¹

The Defense Research Institute (DRI or the Institute) is the largest national organization of lawyers specializing in the defense of civil litigation. The Institute has 17,000 members. They practice in every state. DRI's total constituency consists of some 25,000 defense trial

¹ Pursuant to Rule 37, the respondents' letters of consent have been filed with the Clerk of the Court. Petitioner's written consent accompanies this filing.

lawyers through affiliation with the International Association of Defense Counsel, the Federation of Insurance and Corporate Counsel, the Association of Defense Trial Attorneys, and some sixty state and local defense attorney organizations. DRI members defend clients in civil litigation in countless cases on a day-to-day basis in courtrooms across the nation. The Institute, by its research, publications and public speech, has actively sought to limit the recovery of punitive damages and to establish that constitutional standards exist governing the award of such damages, beginning at least as early as 1969. DRI Monograph, *The Case Against Punitive Damages* (1969); J. Ghiardi and J. Kircher, *Punitive Damages*, § 21.001 (1984). The Institute and its members share a common interest in insuring that awards of punitive damages are fair and just.

SUMMARY OF ARGUMENT

Alabama, like most other states, does not give juries adequate standards for awarding punitive damages. Alabama juries have virtually standardless discretion to impose punitive damages in whatever amounts intuition, caprice, or clever advocacy may suggest. The result is a scheme so lacking in consistency and fairness as to violate due process. The problem is not hypothetical. Recent experience, in Alabama and elsewhere, shows that the law of punitive damages has become the roulette wheel of civil litigation, with plaintiffs encouraged to go for the jackpot and defendants forced to take their chances with financial disaster. No society concerned for fairness and regularity in the administration of justice can afford to tolerate an essentially lawless regime of punishment.

The question is, what to do about it? Although most observers recognize that punitive damages are a problem, few agree on a constitutional remedy. One solution would be to limit punitive damages to some multiple of

compensatory awards. Another solution, which is urged here, would be to require that the states themselves come up with acceptable guidelines for imposing punitive awards. While either solution would work, the latter is more consistent with traditional notions of judicial restraint and settled principles of our Federalism. We therefore urge that this Court hold that due process requires the states to legislate appropriate standards for imposing and constraining punitive damages. Alabama has not done so, and the post-verdict review required by the Alabama Supreme Court is entirely inadequate to this task. The judgment below should therefore be reversed on the ground that the award of punitive damages was not made under a constitutionally acceptable regime of punishment.

ARGUMENT

I. UNGUIDED JURY DISCRETION OVER PUNITIVE DAMAGES VIOLATES DUE PROCESS

It is commonplace to observe that juries are very largely unconstrained in assessing punitive damages. Alabama law is typical. There is no legislative specification of the grounds on which punitive damages may be inflicted nor of the amounts which may be imposed. Neither do jurors have the opportunity to consult experience. Every jury is completely new to the task of punishment. All the jurors know is what they are told by the court, and they are told to do as they please. The Alabama approved pattern jury instruction on punitive damages provides:

The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant, and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. *The imposition of punitive damages is entirely discretionary with the jury.* Should you award punitive damages, in fixing the amount, you

must take into consideration the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs. Alabama Pattern Jury Instructions § 11.03 (1974) (emphasis added).²

Following this "guidance", the trial judge instructed the jury in this case as follows:

Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

This amount of money is awarded to the plaintiff but is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.

Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs. Reporter's Transcript at 897-98.

This instruction gave the jurors nothing concrete to go by. In default of legal guidance or constraint, they simply did as they pleased.

² In Alabama, unlike most states, the problem of punitive damages arises in every wrongful death case. That is because the Alabama Supreme Court has interpreted the state's wrongful death statute, Ala. Code § 6-5-410 (1975), not only as authorizing punitive damages in wrongful death cases but as authorizing *only* punitive damages in wrongful death cases. And this is true even where the liability rests on mere negligence. *Olympia Spa v. Johnson*, 547 So.2d 80, 88 (1989) (Houston, J., concurring in part).

Imagine the outrage if criminal punishment were imposed on this basis. Every judge in America would recognize the unconstitutionality of giving juries unbridled discretion to decide what is criminal, or to select, without guidance or constraint, whatever penalty intuition might suggest. Yet that is precisely what happens every day in punitive damages litigation.

The difference, we are told, is that punitive damages are civil rather than criminal penalties. In one respect, but in one respect only, is this answer sufficient. This Court has determined that the characterization of punishment as civil or criminal is decisive under the Eighth Amendment. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989). A majority of this Court held that, for reasons of history, the provisions of that amendment do not apply to civil penalties.

But while the characterization of punishment as civil or criminal is decisive in the history of the Eighth Amendment, it cannot control—indeed, it is barely relevant to—the due process issue. This Court has never confined the due process guarantee to criminal prosecutions. On the contrary, this Court has said on occasions too numerous to name that due process applies to any legal proceeding that may result in a deprivation of life, liberty, or property. Whatever the context, due process requires that legal procedures be consistent with "fundamental fairness," *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25 (1981); that they be consonant with "ordinary notions of fair play and the settled rules of law," *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); and that they not offend "the community's sense of fair play and decency," *Rochin v. California*, 342 U.S. 165, 173 (1952). In short, due process requires that deprivation of life, liberty, or property be done only pursuant to the rule of law, and not by any arbitrary act.

A chief component of this constitutional guarantee is the vagueness doctrine. The vagueness doctrine is not limited to criminal penalties. See *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). This is as it should be. In a constitutional due process analysis, the fundamental distinction is not between civil and criminal punishment, but between punishment—whether civil or criminal—and compensation. Compensation involves only the allocation of existing loss. Punishment is the creation of loss, an intentional infliction of harm by the state. No society that values freedom from official oppression can be indifferent to the terms on which punishment is inflicted by the state. Nor can we afford to dispense with fundamental fairness simply because a punishment is denominated civil rather than criminal.

For both civil and criminal penalties, the heart of the vagueness doctrine is concern for the rule of law³—that is, for evenhandedness and regularity in the administration of justice. The risk is that punishment will be imposed for insubstantial, unauthorized, even illegitimate reasons, as a particular judge or jury sees fit. The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria for determining the severity of punishment. All of these concerns are implicated by a jury's standardless discretion to award punitive damages in virtually any amount, and they justify searching vagueness review. See *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 86 (1988) (O'Connor, J., with whom Scalia, J., joined, concurring) (the

³ Vagueness cases often also implicate a related concern for fair warning of prohibited conduct. Recently, however, this Court has affirmed that the need to inhibit arbitrary and capricious law enforcement is in fact the "more important" goal of vagueness review. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

jury's "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process").

This case squarely raises the claim that the standardless assessment of punitive liability, as authorized in Alabama and elsewhere, violates due process of law. It also raises the claim that the punishment imposed in this case was excessive and disproportionate to any demonstrated fault of this defendant and therefore also violative of due process. These two claims are closely related.⁴ In fact, in the context of punitive damages, vagueness and disproportionality are merely different windows on the same problem.⁵

Disproportionality refers to punishment that is grossly excessive in relation to the actor's misconduct, punishment that is so extravagant as to be gratuitous. Disproportionality of punishment is exacerbated by—indeed, it is largely a function of—a lack of meaningful standards for determining severity. That is because disproportionality is usually a relative, rather than an absolute, judgment. Whatever the absolute level of punishment, gross and flagrant departures from the norm are excessive. Especially is this so where such departures are wholly unexplained and are not justified by any rational analysis. Obviously, the lack of meaningful standards for determining the severity of sanctions invites excess of

⁴ See Freeman, *Justice Powell's Constitutional Opinions*, 45 Wash. & Lee L. Rev. 411, 443-45 (1988) (comparing the due process approach to punitive damages suggested by Justices O'Connor and Scalia with Justice Powell's opinions in *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and reconciling that approach with the proportionality concept vindicated in *Solem v. Helm*, 463 U.S. 277 (1983)).

⁵ For an earlier analysis suggesting that proportionality constraints are present in both the Due Process Clause and the Eighth Amendment, reflecting their common origin in the Magna Carta provisions on amercements, see Jeffries, *A Comment On The Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986).

this kind. In other words, standardless punishment is objectionable both in its incidence and in its magnitude. Both the fact and the severity of punishment are suspect when there is no constraint on either.

The facts of this case are illustrative. The wrongdoer here was Lemmie Ruffin. He committed fraud on the plaintiffs and doubtless deserves to be punished. Instead, punishment—a fine of over \$1 million—was imposed on the defendant Pacific Mutual Life Insurance Company on a theory of respondeat superior. Thus, Pacific Mutual was punished, and punished severely, for the fraud of its agent. With respect to compensatory damages, this result is unobjectionable. As between the innocent plaintiffs and Pacific Mutual, which gave Mr. Ruffin apparent authority, it is right that the defendant should bear the loss. This kind of reasoning is familiar and persuasive in the context of allocating an existing loss where the real wrongdoer is missing or judgment-proof. But here the jury did not merely allocate an existing loss; they also levied a fine of more than \$1 million, not to make good the plaintiff's loss but to punish for supposed wrongdoing. Thus, Pacific Mutual has been punished, and punished severely, for conduct for which it was not directly responsible, for which it had no illicit motive, and from which it could not gain.

Neither retribution nor deterrence justifies this heavy penalty. Retribution makes sense only when there is genuine wrongdoing. Deterrence makes sense when the actor stands to profit from the act. The goal is to increase the expected costs of wrongdoing to offset the expected benefits. Here the defendant had no expected benefits. The punishment was therefore gratuitous in its imposition and extravagant in its amount.

Of course, any penalty, no matter how extravagant, for any act, no matter how trivial, can be linked up somehow to retribution and deterrence. The concepts can be stretched to reach any case. The question, therefore,

is not whether punishment could conceivably be justified under some set of factual assumptions. The question is whether punishment was actually justified in any given case. Under Alabama law, there is simply no way to tell. Each jury is authorized to inflict huge penalties for mere inattention or to impose no penalty for serious wrongdoing, as its members see fit. No explanation is required. No consistency is possible.

Of course, everyone knows that in Alabama, as elsewhere, most instances of mere inattention will not be punished. However, a few instances will be punished, and perhaps quite severely, under the Alabama law of punitive damages. And what are the criteria for selecting those to be punished? None is specified. What are the rules for determining the severity of the sanction? None is stated. What are the limits to the jury's judgment? None is apparent. This is the very definition of arbitrariness. It is exactly the regime condemned by this Court more than a century ago in *United States v. Reese*, 92 U.S. 214, 221 (1876): "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." The Alabama law of punitive damages sets a net large enough to catch all possible offenders, and leaves it to a succession of juries to say who should be punished and who should not. They act without guidance, without experience, and without explanation. Whatever may be said of this regime, it does not afford due process of law.

II. THE ALABAMA POST-VERDICT REVIEW DOES NOT CURE THIS DEFICIENCY

The Alabama Supreme Court has not been entirely oblivious to these concerns. In an effort to bring punitive damages under some semblance of legal control, that court has required Alabama trial courts to state on the record their reasons for interfering or for not interfer-

ing with a jury verdict on grounds of the excessiveness of damages. *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). This may be a step in the right direction, but it is a very small step indeed. As a recognition that something must be done, the Alabama post-verdict review is welcome, but as a curative for the standardless discretion afforded Alabama juries, it is altogether inadequate. This is so for three reasons.

First, the post-verdict review does not provide standards for the jury's decision. Nothing in the trial court's consideration of a post-verdict motion for remittitur resolves, or even addresses, the fundamental problem of standardless punishment by the jury. Thus, the first and crucial decision is made, as has been noted, in a wholly arbitrary manner.

Second, the post-verdict review does not authorize judges to supplant juries in assessing punitive damages. On the contrary, the Alabama Supreme Court was careful to say that "no substantial rule of law is changed" and that the trial court may not "substitute its judgment for that of the jury." *Id.* at 1379. Thus, it is clear that the Alabama trial judges were given no new authority to control or restrain improper punitive awards. They were merely told to state on the record their reasons for (not) acting. The principal reason for not acting, of course, is a lack of authority to contradict juror intuition. The arbitrariness of standardless jury judgments remains intact.

Third, the instant case confirms that in practice the Alabama post-verdict review process means very little. In this case, the trial judge dutifully followed *Hammond* in stating on the record his reasons for denying remittitur. This part of the opinion, which is reproduced in the petition for certiorari at pages A14-A17, is worth close attention. The trial judge did not say that the jury had reached a sensible result. In fact, he indicated his disagreement with it. He also did not give any reasons that would justify a punitive award against Pacific

Mutual. The only relevant comment was the judge's inference that Lemmie Ruffin's supervisor had participated in the scam and his comment that "it is highly desirable to discourage others, similarly situated from similar conduct." This reasoning would justify a punitive award against Lemmie Ruffin or against his supervisor personally, but it does not explain why Pacific Mutual should be fined over \$1 million. It is plain that both individuals operated in violation of, rather than pursuant to, company policy and that the company had everything to lose and nothing to gain from their behavior. There was *no* discussion of a rationale for awarding punitive damages against Pacific Mutual and *no* explanation of why the jurors decided to do so. Indeed, how could there be? The trial judge had no way of knowing why the jury acted as it did and had no authority to replace its decision with his own. Given those conditions, the post-verdict review turns out to be an exercise in futility. It does not cure the unconstitutionality of the standardless discretion in the Alabama law of punitive damages.

III. AN APPROPRIATE REMEDY FOR THIS CONSTITUTIONAL DEFICIENCY WOULD BE TO REQUIRE STATE LEGISLATURES TO ADOPT SUITABLE GUIDELINES FOR AWARDING PUNITIVE DAMAGES

Excessiveness in the award of punitive damages can be addressed in two ways. The direct approach would simply limit the amount of punitive damages to some multiple of the underlying compensatory award. This approach is relatively straightforward. The compensatory award would be taken as a rough measure of the wrong done. A punitive award would have to bear some relation to that wrong. A sensible and familiar guideline would use a multiple of three. The fact that legislatures, when faced with the analogous question of fixing appropriate penalties, so often choose the multiple of

three suggests that figure as a sensible norm.⁶ That is not to say, however, that there is constitutional magic in the number three or that any award greater than treble damages would necessarily be excessive and disproportionate. It is to suggest that a base-line of treble damages would make a sensible place to begin. Larger judgments should be required to have special justification. While that special justification no doubt could be shown in some cases, it is very unlikely that any defensible reasoning could justify awards of 200 or 745 times compensatory damages, as juries have recently awarded in Alabama. See, e.g., *United American Insurance Co. v. Brumley*, 542 So.2d 1231 (Ala. 1989) (\$1 million punitive award for failure to pay a \$5,000 claim); *Health-america v. Menton*, 551 So.2d 235 (Ala. 1989), cert. denied, 58 U.S.L.W. 3528 (Feb. 20, 1990) (No. 89-939) (nearly \$1.8 million in punitive damages awarded for a claim that apparently did not exceed \$2,500).

Moreover, using treble punishment as a rule of thumb for punitive damages is consistent with the origins of punitive damages under English law. While nineteenth century American courts attributed punitive damages to late eighteenth century English cases, Pollock and Maitland tell us that actions for damages were a relatively late development in English law⁷ and that punitive damages did not originate in these judicial decisions, but in the earlier legislatively-created devices to supplement the cumbersome scheme of presentments for punishing persons for wrongful conduct. These statutes did not provide for unlimited liability at the discretion of a jury.

⁶ See, e.g., 15 U.S.C. § 15(a) (1982) (antitrust); 18 U.S.C. § 1964(c) (1982) (RICO). Under these provisions, the plaintiff's recovery is three times actual damages.

⁷ They define damages as "not a fixed but appointed by law, but a sum of money which the tribunal, having regard to the facts of the particular case, will assess as a proper compensation for the wrong that [the plaintiff] has suffered." 2 F. Pollock and F. Maitland, *The History of English Law*, 522-23 (2d ed. 1909).

Instead, Parliament, implementing the concept of proportionality contained in Magna Carta and subsequent constitutional documents, limited punitive damages to a certain multiple of actual damages, usually double or treble.

The trouble with this solution is not that it would prove ineffective. In fact, a presumptive rule of treble damages would sharply curtail the outrageous abuses of punitive damages that have recently surfaced in Alabama.⁸ The problem is not that a rule of treble damages would not work, but that courts have been reluctant to adopt it. The specification of a multiple of treble damages, even as a guideline, looks like a legislative judgment. Courts are understandably reluctant to invade the legislative function. Moreover, in this case, the concept of federalism advises caution. Yet while judicial self-restraint is commendable and proper, it is so only so long as it does not result in abdication of the overriding judicial responsibility to ensure due process.

An alternative solution, which we commend to this Court, is not to undertake to specify precisely when punitive damages are permissible and in what amounts, but for this Court to require state legislatures to specify when punitive damages are permissible and in what amounts. It is entirely proper for this Court to defer to any reasonable legislative judgment, but it should require that there be a legislative judgment to defer to. After all, the essential problem in the law of punitive damages today is not that state legislatures have made unreasonable judgments. It is that they have made no judgments. The crucial problem is precisely the absence of *any* consistent standard as to when punishment is warranted and in what amount. The problem, in short,

⁸ See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060 (Ala. 1984), vacated and remanded, 475 U.S. 813 (1986), on remand, 505 So.2d 1050 (Ala. 1987).

is standardless punishment. And the obvious cure is to require that standards be set.

This remedy is supported by the due process requirement of prior notice. Some commentators have observed that in certain situations not only is prior notice required, but it is to be given only by an exercise of *legislative* power, whether through a statute or in agency rules adopted pursuant to a statute that contains adequate guidelines for their promulgation. See, e.g., Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 583-84 (1972) (predicting the continued viability of the delegation doctrine and observing that, "[a]t its core, the doctrine is based on the notion that agency action must occur within the context of a rule of law previously formulated by a legislative body"); Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 202-05 (1985).

Due process concerns over the absence or inadequacy of legislative guidelines were voiced by Justices last Term in the contexts of a jury award of punitive damages under state law and a claim for "civil" treble damages under the Racketeering Influenced and Corrupt Organizations Act (RICO). In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), and *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), several Justices noted the seriousness of the due process "void for vagueness" questions present in those cases but not raised by the parties.⁹ There is also a heightened concern where *juries* are not given adequate statutory guidance. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (finding "no justification for allowing awards of punitive damages" where "jury discretion over the amounts awarded is limited only by the gentle rule that they not

⁹ Those arguments are analyzed in Freeman and McSillarow, *RICO and the Due Process "Void for Vagueness" Test*, 45 Bus. Law 1003 (1990).

be excessive"). Thus, in *Browning-Ferris*, Justice Brennan stated in concurrence, 109 S.Ct. 2923:

I join in the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties . . . I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits . . . [Here] the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think best.

Justice O'Connor, concurring and dissenting in part, added: "I adhere to my [comments in a previous opinion] regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." *Id.* at 2924.

The prior notice concerns inherent in both the delegation doctrine and the vagueness doctrine reflect an emphasis upon the legislative branch's core responsibility. In each doctrine, the underlying impulse behind the prior notice requirement is that the lawmaking power be kept in the hands of the legislature in order to avoid ad hoc and arbitrary decisionmaking.

Thus, we urge that this Court declare that civil punishment cannot be imposed in the wholly standardless and ad hoc manner authorized by the Alabama law of punitive damages. We would not declare that punitive damages are unconstitutional. Rather, we would remit the issue to the legislature of Alabama for articulation of appropriate standards for imposing this sort of punishment. The legislature would then have the opportunity to specify criteria for imposing punitive liability and for determining the amount of punitive awards. As the facts of this case suggest, one of the crucial issues

would be whether massive punitive liability can be based on respondeat superior or whether the defendant punished must be directly at fault. Another issue would be whether punitive liability should presumptively bear some relation to the amount of compensatory award. These and other issues can and should be addressed by legislation, and not left to the unaided intuition of a succession of juries.

It is important to note that this proposal is not unusual. Rather, it reflects this Court's traditional approach to the problem of standardless punishment. In analogous situations, this Court has invalidated legal regimes that authorized lawless punishment and allowed legislatures to replace them with schemes of guided discretion. Two examples should suffice.

The most obvious example is the ordinary case of an unconstitutionally vague criminal statute. In such cases, this Court strikes down the vague statute and invites the legislature to replace it with a more narrowly drawn law. A good example is the vagrancy law invalidated in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Such statutes punished anything and everything. They were commonly used by local police to sweep the streets of undesirables. See Foot, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603 (1956). Not surprisingly, some persons were deemed undesirable for wholly illegitimate reasons—as, for example, in *Papachristou* where interracial couples were arrested for riding in an open car down the main thoroughfare of Jacksonville. The invalidation of vagrancy laws invited legislatures to respond with more narrowly drawn statutes, which they did. The more modern laws have not entirely resolved the problem of abusive or discriminatory enforcement, but they are indisputably and incomparably better than the old catch-all vagrancy statutes.

A more precise and informative analogy comes from this Court's cases on the death penalty. The claim that the death penalty is always cruel and unusual under the Eighth Amendment was rejected, although by a divided Court. *Furman v. Georgia*, 408 U.S. 238 (1972). The Court, however, was deeply troubled by the lack of meaningful legislative standards for imposing the capital sanction. The problems identified then in the administration of the death penalty are very similar to problems identified now in the law of punitive damages—arbitrary and capricious punishment, imposed randomly and freakishly, under exceedingly vague standards, with a resulting lack of consistency and equality in the administration of the law. The Court's response was to invalidate open-ended death penalty statutes and to require standards and procedures to guide jury discretion in capital cases. No one would contend that that effort has resulted in a perfect system. But no one can deny that it is a vastly better system than the wholly ad hoc and undisciplined regime whereby jurors sentenced persons to death with no more constraint than a "mystifying cloud of words" on the extraordinarily elusive concept of premeditation. See B. Cardozo, *Law and Literature*, 101 (1931). Thus, although there is deep disagreement about whether death penalty laws are good enough, there can be no serious dispute that they are much better. That improvement resulted from this Court's willingness to insist that legislatures play a more meaningful role in specifying the criteria for capital punishment. Similarly, we urge this Court to insist that legislatures play a more meaningful role in specifying the criteria for punitive damages.

In summary, standardless punishment means not only arbitrary and capricious punishment, but often illicit reliance on inappropriate criteria of punishment. Legislative specification of appropriate standards for decision is a meaningful step toward achieving the kind of regularity and consistency that comports with due process of

law. The burden on this Court will be substantially lessened by this approach, since the Court can review such statutes generically under a more lenient standard of review.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

JOHN CALVIN JEFFRIES, JR.
University of Virginia
Law School
Charlottesville, Virginia 22901
GEORGE CLEMON FREEMAN, JR.*
KYLE E. MCSLARROW
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212
Counsel for Amicus Curiae
Defense Research Institute

Of Counsel:

ARCHIE S. ROBINSON
ROBINSON & WOOD
227 North First Street
San Jose, California 95113
President of the Defense
Research Institute

May 30, 1990

* Counsel of Record

MAY 31 1990

JOSEPH E. SPANIEL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, AND EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

AMICUS CURIAE BRIEF OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES,
THE NATIONAL ASSOCIATION OF MANUFACTURERS,
THE CHEMICAL MANUFACTURERS ASSOCIATION,
AND
THE AMERICAN CORPORATE COUNSEL ASSOCIATION,
IN SUPPORT OF PETITIONER

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN S. AMUNDSON
General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 637-3058

[Of Counsel Continued
on Inside Cover]

May 31, 1990

MALCOLM E. WHEELER
Counsel of Record
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM
300 South Grand Avenue
Los Angeles, California 90071
(213) 687-5000
Counsel for Amici Curiae

DAVID F. ZOLL
Vice President and General Counsel
CHEMICAL MANUFACTURERS ASSOCIATION
2501 M Street, N.W.
Washington, D.C. 20037
(202) 887-1100

NANCY NORD
AMERICAN CORPORATE COUNSEL ASSOCIATION
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 296-4522

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
SUMMARY OF THE PUNITIVE DAMAGES SYSTEM	4
A. Purposes of Punitive Damages	4
B. Procedural Characteristics of Punitive Damages Proceedings	4
1. The Absence of Standards to Guide Juries in Deciding Whether to Award Punitive Dam- ages, Once the Requisite Culpability Has Been Found	5
2. The Absence of Standards to Limit or Guide Juries in Determining What Sum to Award as Punitive Damages	5
3. The Absence of an Objective Standard for Judicial Review of Punitive Damages Ver- dicts	7
C. Effects of the Current Punitive Damages System	9
ARGUMENT	13
I. ALABAMA'S STANDARDLESS PROCE- DURES FOR IMPOSING PUNITIVE DAM- AGES FAIL TO PROVIDE DUE PROCESS OF LAW	13
A. Alabama Fails to Provide Safeguards Against the Arbitrary and Invidiously Dis- criminatory Infliction of Punitive Damages..	13

TABLE OF CONTENTS—Continued

	Page
B. Alabama's Punitive Damages Laws Fail to Provide Adequate Notice of Who Will Be Punished or of the Penal Consequences of Conduct that May Be Punished	21
II. DUE PROCESS REQUIRES THAT ALABAMA ESTABLISH LEGAL STANDARDS TO DETERMINE WHEN AND IN WHAT AMOUNT PUNITIVE DAMAGES ARE TO BE INFLICTED	24
CONCLUSION	28

TABLE OF AUTHORITIES

CASES	Page
<i>Federal Cases</i>	
<i>Albernaz v. United States</i> , 450 U.S. 333 (1981) ..	21
<i>Bifulco v. United States</i> , 447 U.S. 381 (1980)	21
<i>Browning-Ferris Indus. v. Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989)	6, 11
<i>Bankers Life & Cas. Co. v. Crenshaw</i> , 108 S. Ct. 1645 (1988)	19
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985)	21
<i>Calder v. Bull</i> , 3 U.S. (1 Dall.) 386 (1798)	22
<i>Chaplin Refining Co. v. Corporation Commission</i> , 286 U.S. 210 (1932)	22
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	14
<i>Cline v. Frink Dairy Co.</i> , 274 U.S. 445 (1927)	22
<i>Coates v. Cincinnati</i> , 402 U.S. 611 (1971)	16
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	13
<i>FDIC v. W.R. Grace Co.</i> , 691 F. Supp. 87 (N.D. Ill. 1988), <i>aff'd in part, rev'd in part</i> , 877 F.2d 614 (1989), <i>cert. denied</i> , 110 S. Ct. 1524 (1990)	10
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	23
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	14, 20
<i>Giaccio v. Pennsylvania</i> , 382 U.S. 399 (1966)	15, 16, 21
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	15, 20
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	16
<i>Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982)	15
<i>Hurtado v. California</i> , 110 U.S. 516 (1884)	13
<i>In re Medley</i> , 134 U.S. 160 (1890)	22
<i>In re Paris Air Crash</i> , 622 F.2d 1315 (9th Cir.), <i>cert. denied</i> , 449 U.S. 976 (1980)	27
<i>In re Winship</i> , 397 U.S. 358 (1970)	27
<i>International Brotherhood of Electrical Workers v. Foust</i> , 442 U.S. 42 (1979)	14
<i>Interstate Circuit, Inc. v. Dallas</i> , 390 U.S. 676 (1968)	16

TABLE OF AUTHORITIES—Continued

	Page
<i>Kociemba v. G.D. Searle & Co.</i> , 16 Prod. Safety & Liab. Rep. (BNA) 893 (D. Minn. Sept. 19, 1988)	10
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)	15, 21
<i>Lindsey v. Washington</i> , 301 U.S. 397 (1937)	22
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	26
<i>McGautha v. California</i> , 402 U.S. 183 (1971)	19
<i>Rajala v. Allied Corp.</i> , No. 82-228K (D. Kan. Apr. 25, 1988), appeal docketed (10th Cir. May 9, 1988)	10
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	15, 17, 21
<i>Robinson v. California</i> , 370 U.S. 660 (1962)	16
<i>Rosenbloom v. Metromedia, Inc.</i> , 403 U.S. 29 (1971)	14
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982)	16
<i>Small Co. v. American Sugar Ref. Co.</i> , 267 U.S. 233 (1925)	22
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	14
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979)	16, 20, 21
<i>United States v. Evans</i> , 333 U.S. 483 (1948)	20
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971) ..	27
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976) ..	20
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980)	21
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	15, 19
<i>State Cases</i>	
<i>Advertiser Co. v. Jones</i> , 169 Ala. 196, 53 So. 759 (1910)	6
<i>Alabama Power Co. v. Rembert</i> , 208 So. 2d 205 (Ala. 1968)	5
<i>Austin v. Tennessee Biscuit Co.</i> , 52 So. 2d 190 (Ala. 1951)	5
<i>Batteast v. Wyeth Laboratories, Inc.</i> , 172 Ill. App. 3d 114, 526 N.E. 2d 428, appeal granted, 123 Ill. 2d 556, 128 Ill. Dec. 887, 535 N.E. 2d 398 (1988)	10

TABLE OF AUTHORITIES—Continued

	Page
<i>Braley v. Berkshire Mut. Ins. Co.</i> , 440 A.2d 359 (Me. 1982)	25
<i>Brown v. Superior Court</i> , 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470 (1988)	11-12
<i>City Bank of Alabama v. Eskridge</i> , 521 So. 2d 931 (Ala. 1988)	6
<i>Elam v. Alcolac, Inc.</i> , 765 S.W.2d 42 (Mo. App. 1988)	10
<i>Foss v. Maine Turnpike Authority</i> , 309 A.2d 339 (Me. 1973)	25
<i>Hammond v. City of Gadsden</i> , 493 So. 2d 1374 (Ala. 1986)	7, 8, 9
<i>Hines v. Ariens Co.</i> , (Tex. Dist. Ct. July 22, 1988) (reported in <i>The 10 Largest Jury Verdicts of 1988</i> , A.B.A. J., Mar. 1989, at 45)	10
<i>K-Mart Corp. v. Weston</i> , 530 So. 2d 736 (Ala. 1988)	6
<i>Mancari v. Raymark Indus. Inc.</i> , 16 Prod. Safety & Liab. Rep. (BNA) 318 (Del. Super. Ct. Mar. 17, 1988)	10
<i>Maryland Casualty Co. v. Tiffin</i> , 537 So. 2d 469 (Ala. 1988)	4, 6
<i>Masaki v. General Motors Corp.</i> , 16 Prod. Safety & Liab. Rep. (BNA) 225 (Haw. Ct. App. Feb. 29, 1988), rev'd, 780 P.2d 566 (Haw. 1989)	10
<i>Pacific Mutual Life Ins. Co. v. Haslip</i> , 553 So. 2d 537 (Ala. 1989)	7
<i>Roberson v. Ammons</i> , 477 So. 2d 957 (Ala. 1985) ..	7
<i>Roberts v. Seven-Up</i> , 16 Prod. Safety & Liab. Rep. (BNA) 466 (Utah Dist. Ct. Feb. 18, 1988)	10
<i>Toole v. Richardson-Merrell, Inc.</i> , 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967)	10
<i>U-Haul Co. v. Long</i> , 882 So. 2d 545 (Ala. 1980) ..	7
<i>STATUTES</i>	
Ala. Code § 2-2-18	19
Ala. Code § 6-5-544	20
Ala. Code § 8-19-11	20
Ala. Code § 8-22-16	19

TABLE OF AUTHORITIES—Continued

	Page
Ala. Code § 9-16-94	19
Ala. Code § 13A-5-11	19
Ala. Code § 13A-5-12	19
Ala. Code § 22-14-14	19
Ala. Code § 22-33-13	19
Ala. Code § 24-5-14	19
 OTHER AUTHORITIES	
Connell, <i>The Crisis in Contraception</i> , 1987 Technology Review 47	12
Dobbs, <i>Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies</i> , 40 Ala. L. Rev. 831 (1989)	7
Ellis, <i>Fairness and Efficiency in the Law of Punitive Damages</i> , 56 S. Cal. L. Rev. 1 (1982)	18
Ellis, <i>Punitive Damages, Due Process, and the Jury</i> , 40 Ala. L. Rev. 975 (1989)	7
Elliott, <i>Why Punitive Damages Don't Deter Corporate Misconduct Effectively</i> , 40 Ala. L. Rev. 1053 (1989)	17, 24
Franklin & Mais, <i>Tort Law and Mass Immunization Programs</i> (1977)	11
D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, <i>Trends in Tort Litigation: The Story Behind the Statistics</i> (1987)	9, 11
Mahoney, <i>Punitive Damages: The Courts Are Curbing Creativity</i> , N.Y. Times, Dec. 11, 1988, § 3, at 3, col. 1	12
Morris, <i>Punitive Damages in Tort Cases</i> , 44 Harv. L. Rev. 1173 (1937)	25
Note, <i>Punitive Damages for Libel</i> , 98 Harv. L. Rev. 847 (1985)	18
H. Packer, <i>The Limits of the Criminal Sanction</i> (1968)	18
M. Peterson, S. Sarma & M. Stanley, <i>Punitive Damages: Empirical Findings</i> (1987)	10
W. Prosser & W.P. Keeton, <i>The Law of Torts</i> (5th ed. 1984)	5

TABLE OF AUTHORITIES—Continued

	Page
Twerski, <i>A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution</i> , 18 U. Mich. J.L. Ref. 575 (1985)	12
Wheeler, <i>The Constitutional Case for Reforming Punitive Damage Procedures</i> , 69 Va. L. Rev. 269 (1983)	4, 25, 27
Wheeler, <i>A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation</i> , 40 Ala. L. Rev. 919 (1989)	18
Wheeler, <i>Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment</i> , 24 Stan. L. Rev. 838 (1972)	18
U.S. Department of Justice, <i>An Update on the Liability Crisis: Tort Policy Working Group</i> (1987)	11, 12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
v. *Petitioner,*

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, AND EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

AMICUS CURIAE BRIEF OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES,
THE NATIONAL ASSOCIATION OF MANUFACTURERS,
THE CHEMICAL MANUFACTURERS ASSOCIATION,
AND
THE AMERICAN CORPORATE COUNSEL ASSOCIATION,
IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Chamber of Commerce of the United States, the National Association of Manufacturers, the Chemical Manufacturers Association, and the American Corporate Counsel Association, with the consent of the parties, file this brief as *amici curiae* in support of the petitioner.*

The United States Chamber of Commerce is America's largest federation of businesses, representing more than

* Consent letters have been filed with the Clerk.

180,000 companies, several thousand trade and professional associations, and hundreds of state and local Chambers of Commerce. The National Association of Manufacturers is an association of approximately 13,500 companies and subsidiaries that together employ 85% of all manufacturing workers in the United States and produce more than 80% of the nation's manufactured goods. The Chemical Manufacturers Association is a non-profit trade association whose member companies produce, market, and use industrial chemicals. Its member companies comprise 90% of the production capacity of basic industrial chemicals in the United States. The American Corporate Counsel Association is a national bar association of approximately 8,000 attorneys from the legal staffs of corporations and other business entities in the private sector who are called upon to advise their clients regarding litigation and settlement of claims filed against their clients.

This case is of interest to these *amici* because business entities are among the primary victims of unpredictable and arbitrary punitive damages verdicts that have been awarded without adequate procedural safeguards, with increasing frequency, and in dramatically larger sums in recent years. As principal voices of the business and manufacturing communities, these *amici* are well suited to present to the Court the effects, and the due process infirmities, of a system that allows punitive damages to be imposed by juries without guidance or specified restrictions as to when and in what amount such punishment should be inflicted.

SUMMARY OF ARGUMENT

In punitive damages proceedings in Alabama, once the defendant has been found to have committed a punishable act, juries have, and are told that they have, total discretion in deciding whether to withhold or impose punitive damages. Juries also are told that the amount of punitive damages is a matter for their discretion. Juries are told

that the purposes of punitive damages are to punish and deter, but those terms are not defined, the limitations dictated by deterrent and retributive principles are not identified, and the information needed to apply those principles is not provided. Nor is any other standard, limit, or guidance provided.

The process of judicial review does not cure these deficiencies, because that process is equally standardless. Although trial courts are required to state reasons for granting or denying motions for remittitur and new trials, punitive damages verdicts are allowed to stand unless the "judicial conscience" is "shocked" by the excessiveness of the verdict or by proof of "bias, passion, corruption, or other improper motive."

Because of this absence of standards at every level, both the imposition of any punitive award and the size of the punitive award that may follow from any contemplated act are entirely unpredictable. There is no consistency of verdicts. And the license given to juries invites and yields decisions that are arbitrary, invidiously discriminatory, and subject to no meaningful judicial review.

These punitive damages proceedings provide a paradigm of what the Due Process Clause of the Fourteenth Amendment seeks to prevent: the use of unduly vague laws to subject citizens to deprivation and punishment. Alabama therefore should be required to adopt punitive damages standards, either legislative or common law, that provide greater specificity and predictability and that more carefully guard against arbitrary and invidiously discriminatory punishment. The adoption of such standards not only will better safeguard defendants' rights, but will better serve the state's legitimate interests in achieving *proper* deterrence and punishment in a judicially efficient manner.

SUMMARY OF THE PUNITIVE DAMAGES SYSTEM

The purposes, procedural characteristics, and results of punitive damages proceedings in the State of Alabama, and in like jurisdictions, are central to the due process issue addressed in this brief. They are as follows.

A. Purposes of Punitive Damages

Punitive damages in Alabama, as elsewhere, are penal in nature. The trial court in this case instructed the jury that punitive damages are "to punish the defendant" and "to make an example" and are "not to compensate the plaintiff for any injury." (Tr. 897.) *See Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988) ("the purpose of punitive damages is not to compensate the plaintiff but to punish the wrongdoer and to deter others from committing similar wrongs in the future").

B. Procedural Characteristics of Punitive Damages Proceedings

The punitive damages system in Alabama, like the punitive damages systems in most other states, is characterized by the absence of standards at three levels: (1) The absence of standards given to juries to guide them in deciding whether punitive damages should be awarded, once the requisite culpability has been found; (2) the absence of standards given to juries to guide them in determining the appropriate size for a punitive damages award; and (3) the absence of objective standards for judicial review of juries' punitive damages verdicts. All of these procedural infirmities infected the proceedings in this case.¹

¹ Alabama punitive damages proceedings suffer from other procedural infirmities as well. These include a failure to require proof of the punitive damages claims by more than a mere preponderance of the evidence and a failure to require that the punitive damages, or "sentencing," issues be tried only after underlying tort liability has been found. *See generally* Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 Va. L. Rev. 269, 276-322 (1983).

1. *The Absence of Standards to Guide Juries in Deciding Whether to Award Punitive Damages, Once the Requisite Culpability Has Been Found*

Once it has determined that a defendant committed an act that permits an award of punitive damages, an Alabama jury has unbridled discretion to award or withhold punitive damages. The jury is given no standard and no guideline that tells it how it must or must not exercise that discretion. The jury is simply instructed that it may award punitive damages if it finds that the defendant acted with the requisite culpability. Here, for example, the jury was told:

Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages So, if you feel [—] or not feel, but if you are reasonably satisfied from the evidence [—] that the plaintiff you are talking about has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages Imposition of punitive damages is entirely discretionary with the jury

(Tr. 897-98.) *See Alabama Power Co. v. Rembert*, 208 So. 2d 205, 206 (Ala. 1968); *Austin v. Tennessee Biscuit Co.*, 52 So. 2d 190, 194 (Ala. 1951); W. Prosser & W.P. Keeton, *The Law of Torts* § 3, at 14 (5th ed. 1984).

2. *The Absence of Standards to Limit or Guide Juries in Determining What Sum to Award as Punitive Damages*

Alabama, like most other states, also provides no standard to limit or guide juries in determining what amount to award as punitive damages, once the decision to award some punitive damages has been made. Although the dual purposes of deterrence and punishment may be stated

to the jury, no definition of either term is provided, and no explanation of the limits that deterrent and retributive principles dictate is articulated. The only additional information provided by the trial court in this case, for example, was as follows:

Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.

(Tr. 898.) See *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988).

This absence of standards and guidance reflects a stark fact of Alabama law: "There is no legal measure of [punitive] damages" in Alabama. *K-Mart Corp. v. Weston*, 530 So. 2d 736, 740 (Ala. 1988) (quoting *Advertiser Co. v. Jones*, 169 Ala. 196, 209, 53 So. 759, 764 (1910)). Punitive damages "need bear no relationship to actual damages, and their award is left largely to the discretion of the jury." *City Bank of Alabama v. Eskridge*, 521 So. 2d 931, 933 (Ala. 1988). See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Vermont law) ("punitive damages are imposed by juries guided by little more than an admonition to do what they think is best") (Brennan & Marshall, JJ., concurring).

Thus, no maximum award is specified by the legislature or by the courts. No relationship between the harm caused and the size of the punitive award is required or suggested. No proportionality between the punishment imposed in one case for one type of wrongful conduct and the punishment imposed in other cases for other types of conduct is required or suggested. No similarity between the punishment imposed in one case for particular conduct and the punishment imposed in other cases for identical or similar conduct is required or suggested. No instruction is given as to what must be considered or what must not be considered in determining the amount

of punishment. No instruction regarding the deterrent effects of compensatory damages and litigation costs is given, and juries are not told that they must, should, or may consider those effects. No information about statutory civil penalties and criminal fines for similar and dissimilar conduct is given. The jury is not even told that it must refrain from awarding more than is necessary to achieve the proper amount of deterrence and punishment.²

3. *The Absence of an Objective Standard for Judicial Review of Punitive Damages Verdicts*

In deciding whether to grant a motion for remittitur or a new trial attacking a punitive damages verdict awarded pursuant to the standardless proceedings described above, courts follow the rule that juries' punitive damages verdicts "are presumed correct." *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537, 543 (Ala. 1989). Remittitur or a new trial may be ordered

only where the record establishes that the award is excessive or inadequate as a matter of law, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption, or other improper motive

Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986). Whether a punitive damages award is excessive "depends upon whether or not the judicial conscience is shocked." *Roberson v. Ammons*, 477 So. 2d 957, 961 (Ala. 1985) (quoting *U-Haul Co. v. Long*, 382 So. 2d 545, 548 (Ala. 1980)). Thus, although trial courts must "reflect in the record the reasons for interfering

² "Instructions range from a kind of verbal shrug of the shoulders to the pious and flabby abstractions The short version might be, 'Do right, be good.'" Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 872 n.102 (1989). See Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 979 (1989) ("stated criteria employed for imposing punitive damages comprise a multiplicity of vague, overlapping terms").

with a jury verdict, or refusing to do so," *Hammond v. City of Gadsden*, 493 So. 2d at 1379, judicial review remains as standardless as the juries' initial determinations.³

³ In *Hammond* the Alabama Supreme Court identified only four factors that it labeled "appropriate for the trial court's consideration": (1) "The culpability of the defendant's conduct"; (2) "the desirability of discouraging others from similar conduct"; (3) "the impact upon the parties"; and (4) "the impact on innocent third parties." 493 So. 2d at 1379. That list is little more than a restatement of the rule that punitive damages are imposed to punish and to deter. It neither identifies the limiting principles of deterrent and retributive doctrines nor reveals the sources or types of information that is to be considered.

More importantly, immediately after having listed the four factors "appropriate for the trial court's consideration," the supreme court stated: "In adopting this new procedure, we emphasize that no substantial rule of law is changed. A trial court may not conditionally reduce a jury verdict merely because it believes the verdict overcompensates the plaintiff; nor may the trial court substitute its judgment for that of the jury We simply now require the trial court to state for the record the factors considered in either granting or denying a motion for new trial" *Id.* (citations omitted).

Thus, the required listing of factors does nothing to search out or prevent arbitrary, discriminatory, or otherwise unjust verdicts. Quite to the contrary, it serves as a tool for appellate courts to use to *prevent* trial courts from modifying jury verdicts.

In addition, almost any statement by a trial court in support of a denial of a motion for remittitur will satisfy the *Hammond* requirement. In this case, for example, the trial court gave only three reasons why the seven-figure punishment of Pacific Mutual was proper: (1) "It goes without saying that it is highly desirable to discourage others, similarly situated from similar conduct" [*i.e.*, conduct similar to that of Mr. Ruffin, whose unauthorized theft of premiums made Pacific Mutual a victim]; (2) "The jury seems to fashioned [*sic*] their awards in proportion to the damage done each plaintiff" [*i.e.*, the awards within the one case were proportional to each other, but may or may not have been proportional when compared to other awards, to relevant civil and criminal penalties, or to any other guideline]; and (3) "The jury was composed of male and female, white and black." (Petition for Writ of Certiorari at A-15.)

No objective criterion has been articulated to provide guidance or predictability as to when the "judicial conscience" is likely to be "shocked." No objective criterion has been articulated to provide guidance or predictability as to how or when a court is likely to find that a damages award is based on "bias" or "passion."

Unlike courts in criminal proceedings and actions for civil penalties, courts reviewing punitive damages awards receive no standard, limitation, or guidance from the legislature. Courts, like juries, do not consider the presence or absence of proportionality between the punitive damages awards in similar or dissimilar cases. Courts, like juries, do not consider the level or availability of criminal fines and civil penalties for similar and dissimilar conduct. Courts, like juries, do not consider the deterrent effect of compensatory damages, defense costs, or regulatory proceedings arising out of the same conduct. Instead, given that juries are not instructed to consider any of those matters, it apparently would be error for a court to order remittitur or a new trial on the basis of any of them, because the court may not "substitute its judgment for that of the jury." *Hammond v. City of Gadsden*, 493 So. 2d at 1379.

C. Effects of the Current Punitive Damages System

A comprehensive analysis of jury verdicts in the United States, prepared by the RAND Institute for Civil Justice, shows that the growth in the average award in the types of tort litigation that manufacturers commonly face "has been truly explosive, reflecting increases ranging from 200 to more than 1000 percent" from the period 1960-1964 to 1980-1984. D. Hensler, M. Vaiana, J. Kalkalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics*, 18 (1987). That explosion has been paralleled by a dramatic increase in both the frequency and the size of punitive damages awards against manufacturers.

Before 1970, for example, there was only one reported appellate court decision upholding an award of punitive damages in a product liability case—an award of \$250,000. See *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Today, hardly a month goes by without a multi-million dollar punitive damages verdict against a manufacturer.⁴

Researchers for the RAND Institute for Civil Justice also have empirically determined that “[c]orporate defendants are . . . more likely than individuals or public agencies to be the target of [punitive damages] awards.” M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* iii (1987). Not only are businesses thus more frequently targeted, but “[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases.” *Id.* at 50. The net result has been systematic

⁴ See, e.g., the following reported verdicts in 1988: *Rajala v. Allied Corp.*, No. 82-228K (D. Kan. Apr. 25, 1988), appeal docketed (10th Cir. May 9, 1988) (\$60 million punitive damages verdict); *Masaki v. General Motors Corp.*, 16 Prod. Safety & Liab. Rep. (BNA) 225 (Haw. Ct. App. Feb. 29, 1988) (\$11.25 million punitive damages verdict), *rev'd*, 780 P.2d 566 (Haw. 1989); *Batteast v. Wyeth Laboratories, Inc.*, 172 Ill. App. 3d 114, 526 N.E.2d 428 (\$13 million punitive damages verdict), *appeal granted*, 123 Ill. 2d 556, 128 Ill. Dec. 887, 535 N.E.2d 398 (1988); *FDIC v. W.R. Grace Co.*, 691 F. Supp. 87 (N.D. Ill. 1988) (\$75 million punitive damages verdict), *aff'd in part, rev'd in part*, 877 F.2d 614 (1989), *cert. denied*, 110 S. Ct. 1524 (1990); *Kociemba v. G.D. Searle & Co.*, 16 Prod. Safety & Liab. Rep. (BNA) 893 (D. Minn. Sept. 19, 1988) (\$7 million punitive damages verdict); *Roberts v. Seven-Up*, 16 Prod. Safety & Liab. Rep. (BNA) 466 (Utah Dist. Ct. Feb. 18, 1988) (\$10 million punitive damages verdict, remitted to \$300,000); *Mancari v. Raymark Indus. Inc.*, 16 Prod. Safety & Liab. Rep. (BNA) 318 (Del. Super. Ct. Mar. 17, 1988) (\$22 million punitive damages verdict, new trial granted); *Elam v. Alcolac, Inc.*, 765 S.W.2d 42 (Mo. App. 1988) (\$42.9 million punitive damages verdict, new trial granted); *Hines v. Ariens Co.* (Tex. Dist. Ct. July 22, 1988) (\$5 million punitive damages verdict) (reported in *The 10 Largest Jury Verdicts of 1988*, A.B.A. J., Mar. 1989, at 45, 47).

discrimination against business defendants: “Juries also award more money when the defendants are institutions or organizations rather than individuals—the ‘deep-pocket’ effect [W]e can detect a separate, statistically independent effect for deep-pocket defendants, even in cases that do not involve products or malpractice.” D. Hensler, M. Vaiana, J. Kakalik, M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

The effect of these massive and discriminatory punitive awards on American industry, and indirectly on the American public, has been devastating. Cf. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (“The threat of such enormous awards has a detrimental effect on the research and development of new products”) (O'Connor & Scalia, JJ., concurring). Important health products have drastically risen in price or been withdrawn from the market altogether. See *Brown v. Superior Court*, 44 Cal. 3d 1049, 1064, 245 Cal. Rptr. 412, 421, 751 P.2d 470, 479 (1988) (discussing withdrawal of Bendectin from market after price increased by more than 300 percent; also discussing withdrawal of all but two manufacturers of diphtheria-pertussis-tetanus vaccine, and price increase from eleven cents per dose to \$11.40 per dose in four years); Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) (discussing drug manufacturers' refusal to supply influenza vaccine until Government assumed the risk of lawsuits resulting from injuries caused by the vaccine); U.S. Department of Justice, *An Update on the Liability Crisis: Tort Policy Working Group* 51 (1987) (stating that an \$8 million punitive damages award “almost jeopardized the viability of the entire polio vaccination program,” but was reversed).

Equally important new products have been withheld from introduction altogether. See *Brown v. Superior Court*, 44 Cal. 3d at 1065, 245 Cal. Rptr. at 421, 751

P.2d at 480 (discussing non-introduction of new drug for the treatment of vision problems because of unavailability of adequate liability insurance); Mahoney, *Punitive Damages: The Courts Are Curbing Creativity*, N.Y. Times, Dec. 11, 1988, § 3, at 3, col. 1 (possible substitute for asbestos abandoned "just before commercialization" because of punitive damages/tort system). American manufacturers have fallen behind in the development of major product groups. See, e.g., Connell, *The Crisis in Contraception*, 1987 Technology Review 47 (statement by Elizabeth B. Connell, M.D., member of FDA Obstetrics and Gynecology Advisory Committee, that "the United States is losing its leadership role in this area of contraceptive technology—with potentially disastrous consequences for women and men in this country and elsewhere").

A study conducted by the United States Department of Justice on the liability crisis indicated that the prevailing punitive damages systems also "serve as a significant obstacle to the settlement process by giving the plaintiff unrealistic expectations of the value of his case even where the defendant has made a generous settlement offer." See U.S. Department of Justice, *An Update on the Liability Crisis: Tort Policy Working Group, supra*, at 51. "It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon." *Id.* (quoting Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. Mich. J.L. Ref. 575, 612 (1985)).

ARGUMENT

I. ALABAMA'S STANDARDLESS PROCEDURES FOR IMPOSING PUNITIVE DAMAGES FAIL TO PROVIDE DUE PROCESS OF LAW

If one were to set out to design a system of punishment with the least amount of notice, consistency, and predictability, the greatest likelihood of arbitrariness and invidious discrimination, and the least likelihood of properly serving the goals of optimal deterrence and retribution, one surely would design a system that makes no attempt to relate the size or frequency of punishment to the avowed purposes of deterrence and retribution. The sentencing entity would have, and would be told that it has, unfettered discretion to withhold or inflict punishment, once the triggering conduct had been established. The sentencing entity also would have, and would be told that it has, unfettered discretion to inflict punishment in any amount that it wished. The Alabama punitive damages system is just such a system.

This system violates the Due Process Clause of the Fourteenth Amendment for three reasons. It fails to provide safeguards against arbitrary and invidiously discriminatory punishment. It fails to provide notice of who will be punished. And it fails to provide notice of the penal consequences of conduct that may be punished.

A. Alabama Fails to Provide Safeguards Against the Arbitrary and Invidiously Discriminatory Infliction of Punitive Damages

This Court long ago established that the Due Process Clause of the Fourteenth Amendment was "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986), quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884). In opinions spanning a period of almost twenty years, most of the members of this Court

have recognized that the prevailing punitive damages system fails to satisfy that requirement. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages laws leave juries "free to use their discretion selectively to punish expressions of unpopular views") (Powell, J., joined by Marshall, Blackmun, & Rehnquist, JJ.); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979) ("punitive damages may be employed to punish unpopular defendants") (Marshall, J., joined by Brennan, Stewart, White, & Powell, JJ.); *Smith v. Wade*, 461 U.S. 30, 59 (1983) ("punitive damages are frequently based upon the caprice and prejudice of jurors") (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting); cf. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) ("Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award.") (Blackmun, J., joined by Burger, C.J., and Stewart, White, Powell, & Rehnquist, JJ.); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 74-75 (1971) (when punitive damages "bear no relationship to the actual harm caused, they then serve essentially as springboards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an infinitely wide range of penalties wholly unpredictable in amount Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for the States to permit punitive damages that bear no discernible relationship to the actual harm caused") (Harlan, J., dissenting); *id.* at 84 ("This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others.") (Marshall, J., dissenting).

Nevertheless, most states have failed to cure the systemic infirmities that have led to the rash of punitive

damages awards described in the Summary of the Punitive Damages System of this brief. See pp. 9-11, *supra*. Alabama, for one, still does not limit juries' ability to base their decisions whether to punish and, if so, in what amount on wholly improper factors such as race, residency, sex, or corporate status.

The due process concern presented by such standardless systems is well expressed in the void-for-vagueness doctrine, which requires that penal, quasi-penal laws, and other laws be defined "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (criminal statute); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (civil penalties, "quasi-criminal" ordinance); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (civil action based on Minnesota Human Rights Act). The doctrine's primary goal is to ensure that juries and law-enforcement personnel do not "pursue their personal predilections." *Kolender*, 461 U.S. at 358. It also aims to reduce "the danger of caprice and discrimination in the administration of the laws" and to "permit[] meaningful judicial review." *Roberts*, 468 U.S. at 629.

The Constitution's antipathy for vague laws finds its clearest voice in the prohibition "against arbitrary and discriminatory punishment." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (applying Due Process Clause). See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As the Court has recognized in a variety of contexts, such arbitrariness and unjust discrimination cannot be prevented unless punishments are imposed pursuant to cognizable, objective standards. See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion) ("It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. . . . Otherwise, the system cannot function in a consistent and rational manner.'"); cf. *Giaccio*, 382 U.S. at 402 (Due

Process Clause violated by "vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs"). In the absence of such standards, juries can silently base their decisions to punish, and the severity of their punishments, upon invidious discrimination, raw emotion, and even whim. *Cf. Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (child custody proceedings "employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge"). Any punishment so motivated, no matter how small, would be excessive. *See Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

Punishments therefore must be constrained by cognizable limits and guidelines fixed *before* the defendant has acted. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"); *Giacco*, 382 U.S. at 405 n.8 (referring to constitutionality of allowing juries "to fix punishment *within legally prescribed limits*") (emphasis added).

Alabama's punitive damages laws fall woefully short of those minimum due process requirements. By giving juries unfettered discretion—and especially by *telling* juries that they have unfettered discretion—to withhold or inflict punitive damages, once the requisite misconduct has been established, Alabama "impermissibly delegates basic policy matters to . . . juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). *Accord Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 684-85 (1968). In particular, by giving juries no guidance, and instead

encouraging them to base their decision whether to punish on their own unstated values and notions, Alabama delegates to juries the basic policy matter of what factors should and should not govern the decision whether to punish any citizen.

Similarly, by giving juries no guidance for determining how much punishment should be inflicted, once the decision to award some punitive damages has been reached, Alabama impermissibly delegates to juries the basic policy matter of what factors should and should not determine the size of punitive damages awards.⁵

Because of the absence of any jury standard, the great deference and extremely narrow scope of review applied to jury verdicts by reviewing courts, and the absence of any objective standard of judicial review, the Alabama punitive damages laws are also too vague to permit the "meaningful judicial review" required by *Roberts*. In sum, the Alabama punitive damages laws are impermissibly vague at every level.

As a result, not only are citizens arbitrarily and unfairly punished, but the legitimate purposes of punitive damages are ill-served. Any case-to-case consistency in the relationship between the severity of punishment and the gravity of wrongdoing must be purely fortuitous. Similarly, because juries are not given any guidance regarding the principles of deterrence or retribution, any relationship between those principles and the juries' awards must be wholly accidental.

⁵ *See Elliott, Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala. L. Rev. 1053, 1055 (1989) ("Today we no longer recognize unlimited power by juries to make legal policy based on their own values; the prevailing concept is that law is a rational instrument to implement the policies of the state. The notion that individual juries may willy-nilly punish those who offend them is anomalous in a system of tort law that increasingly conceives of itself as devoted to creating rational incentives for appropriate levels of safety.").

Punitive awards imposed by juries with such untrammelled discretion do not promote proper deterrence. Deterrence theory assumes that potential actor will rationally weigh the benefits and costs likely to flow from contemplated wrongful conduct. Rational deterrence obtains, therefore, only if the actors are informed about the magnitude of the costs, including punishments, they are likely to incur if they engage in the proscribed conduct. If, as in Alabama, laws fail to establish standards for punitive damages awards, actors contemplating wrongful conduct can only guess at the likely consequences of their misdeeds, as they must do in Alabama.

Rational deterrence also requires that punishment be imposed in the amount, and only in the amount, necessary to ensure that the actors' expected costs (i.e., actual costs adjusted upward to account for the probability that the conduct will not be detected and successfully prosecuted by injured persons), will equal any gain that they would otherwise expect to obtain from the contemplated wrong conduct. See H. Packer, *The Limits of the Criminal Sanction* 45-48 (1968); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 23-24, 43-53 (1982); Note, *Punitive Damages for Libel*, 98 Harv. L. Rev. 847, 849-51 (1985). Punishment in any other amount will either deter desirable activity or fail to deter undesirable activity.

Punitive awards imposed pursuant to standardless jury submissions also fail to serve the state's retributive purposes. The basic test of the propriety of punishment as retribution is that the punishment must be proportionate to the wrongdoing. See Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 846 (1972). Punitive damages imposed pursuant to standardless jury submissions violate that proportionality requirement. See Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 945-46 (1989).

It is no answer for Alabama and others to assert that the total absence of standards merely provides for the exercise of jury discretion. The authority that juries are exercising is not "discretion in the legal sense of that term, but . . . mere will. It is purely arbitrary and acknowledges neither guidance nor restraint." *Yick Wo v. Hopkins*, 118 U.S. at 366-67 (reviewing exercise of discretion in Fifth Amendment context).

[D]iscretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds. Otherwise, . . . "[i]t is always unknown: It is different in different men: . . . In the best it is oftentimes caprice: In the worst it is every vice, folly, and passion, to which human nature is liable."

McGautha v. California, 402 U.S. 183, 285 (1971) (Brennan, Douglas & Marshall, JJ., dissenting). See also *Bankers Life & Cas. Co. v. Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (the "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process") (O'Connor & Scalia, JJ., concurring in judgment).

Nor is it prohibitively difficult for legislatures or courts to establish limits on, or objective standards for, punitive damages awards in order to reduce the risk or scope of arbitrary and discriminatory actions of juries. Alabama, for example, has fixed maximum criminal fines for the entire panoply of criminal acts (see, e.g., Ala. Code § 13A-5-11 (felonies); Ala. Code § 13A-5-12 (misdemeanors and violations); maximum civil penalties for a wide variety of civil misconduct (see, e.g., Ala. Code § 2-2-18 (Alabama Pesticide Act); Ala. Code § 8-22-16 (motor fuel marketing); Ala. Code § 9-16-94 (violation of permit condition for surface mining control and reclamation); Ala. Code § 22-14-14 (regulation of sources of ionizing); Ala. Code § 22-33-13 (toxic substances in the workplace); Ala. Code § 24-5-12 (mobile homes)); and maximum punitive

damages for still other civil misconduct (*see, e.g.*, Ala. Code § 6-5-544 (medical malpractice)). Some of these fixed civil fines and punitive awards are for conduct that is similar in effect and culpability to the fraud of Mr. Ruffin in this case. *See, e.g.*, Ala. Code § 8-19-11 (maximum civil penalties for deceptive trade practices).

In sum, punitive damages are imposed in Alabama pursuant to laws that specify no limits, no required relationship to culpability, no required relationship to the punishments for other acts of wrongdoing, no other objective standard for determining when and in what amount they are to be imposed, and no objective standard of judicial review. Punitive awards thus imposed serve no valid state interest.⁶ Under these circumstances, the state's legislature, or its courts through common law development, should be required to "replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing [punishment]." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).⁷

⁶ As the Court previously has declared, "States have no substantial interest in securing for plaintiffs gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349.

⁷ *See generally United States v. Evans*, 333 U.S. 483, 486 (1948) ("In our system, so far at least as concerns the federal process, defining crimes and fixing penalties are legislative, not judicial functions."); *United States v. Batchelder*, 442 U.S. at 125-26 (discussing "the Legislature's responsibility to fix criminal penalties"); *Gregg v. Georgia*, 428 U.S. at 174 n.19 (plurality opinion) ("legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values").

B. Alabama's Punitive Damages Laws Fail to Provide Adequate Notice of Who Will Be Punished or of the Penal Consequences of Conduct that May Be Punished

Alabama's punitive damages laws also violate the due process requirement that statutes be specific enough to provide "actual notice to citizens" regarding the consequences of their contemplated conduct. *Kolender v. Lawson*, 461 U.S. at 357-58. In view of the complete absence of guidance as to when and in what amount punitive damages will be inflicted for *any* type of conduct, it is beyond dispute that those laws are "so vague that [persons] of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Roberts*, 468 U.S. at 629. Similarly, the vagueness of the laws precludes the predictability that due process requires so that potential defendants can structure their conduct with a reasonable understanding of the consequences. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

This absence of notice in laws governing the punishment to be imposed is as unacceptable to due process principles as is an absence of notice in laws describing the conduct that triggers punishment. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979) (Due Process Clause applies to penalty provisions that "do not state with sufficient clarity the consequences of violating a given criminal statute"); *see also, e.g., Albernaz v. United States*, 450 U.S. 333, 342 (1981); *Bifulco v. United States*, 447 U.S. 381, 387 (1980). And the requirement of fair notice applies to penalties that are denominated as "civil," rather than "criminal."⁸ In our legal system, a defendant, civil

⁸ *See, e.g., Giaccio v. Pennsylvania*, 382 U.S. at 402 ("[b]oth liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be

or criminal, is entitled to fair warning of the sanctions that the law can impose on him.

The constitutional necessity for fair notice of penal consequences is so strong that it is reflected in the Constitution's explicit proscription of *ex post facto* laws, a proscription that invalidates "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 390 (1798) (Chase, J., separate opinion).⁹

Without predetermined standards for punishments, that principle is eviscerated. When a state's legislature and courts fail to establish predetermined standards, and leave to juries' unchanneled discretion both the decision whether to punish and the decision of how severely to punish, there is no effective limit on or consistency of, and therefore no notice of, the punishment to be applied or enforced. Each

avoided by the simple label [of civil or criminal] a State chooses to fasten upon its conduct or its statute"); *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 240-243 (1932) (the due process right to fair notice applies to sanctions imposed in a civil proceeding); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 463 (1927) ("[t]he principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation"); *Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) (The due process principle of fair notice is "not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all").

⁹ *Accord Lindsey v. Washington*, 301 U.S. 397, 401 (1937) ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."); *In re Medley*, 134 U.S. 160, 171 (1890) ("no one can be criminally punished in this country except according to a law prescribed . . . before the imputed offense was committed, or by some law passed afterwards, by which the punishment is not increased").

jury is left free to base the level of punishment on an *ad hoc*, retrospective reaction to the status and characteristics of a particular defendant, rather than on legitimate penal purposes.

For example, because the jury's decisions whether and in what amount to award punitive damages are unreviewable and may be based upon anything at all, it would be pure happenstance if any particular punitive award were to be proportionate to the wrongdoing committed or serve any other legitimate purpose. In other instances of the same (or more culpable) conduct by other defendants, juries may have awarded only compensatory damages and refrained, on the basis of bias, caprice, or sympathy, from awarding punitive damages. *Cf. Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (capital punishment imposed under the challenged statute was "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."). Under these circumstances, citizens have no notice of the likely penal consequences of their actions.

In this case, for example, Respondent Pacific Mutual hardly could have suspected that, solely on the basis of *respondent superior*, without any negligence, much less recklessness or intentional misconduct, on its part, and without any gain derived by it as a result of its agent's unauthorized misconduct, it might be held liable for one of the largest punitive damages awards ever affirmed by the Alabama appellate courts. In fact, given what must have been hundreds of prior judgments in Alabama for fraud and more serious tortious conduct, given the small number of prior punitive damages awards exceeding a million dollars, and given the small amount of compensatory damages involved in this case, the punitive damages

award sought and apparently given in this case was quite unpredictable. *See Elliott, supra*, 40 Ala. L. Rev. at 1057 ("The central failing of punitive damages that renders them incompatible with modern tort law is *unpredictability*.").

II. DUE PROCESS REQUIRES THAT ALABAMA ESTABLISH LEGAL STANDARDS TO DETERMINE WHEN AND IN WHAT AMOUNT PUNITIVE DAMAGES ARE TO BE INFLICTED

The fundamental flaw in Alabama's punitive damages system is the combined absences of standards for the determination of whether to award punitive damages, for the determination of how large a punitive damages award may or should be, and for judicial review of punitive damages verdicts. If punitive damages are to continue to be awarded, that flaw must be remedied by the adoption, by the Alabama Legislature or the Alabama courts, of standards to fill the void.

Although an appropriate remedy by this Court may be to reverse and remand to the Alabama Supreme Court to enable that court and the Alabama Legislature to adopt specific standards consistent with general principles articulated in the opinion to be provided by this Court, certain requirements are fundamentally necessary to reduce to an acceptable level the vagueness of the current laws.

Juries currently are instructed that a purpose of punitive damages is to deter similar wrongful conduct in the future. They also should be instructed that society would be harmed by, and they must not award, punitive damages in any amount larger than what is needed to serve that purpose. They should be instructed that they must not allow anger or any other emotion they might feel, or the defendant's residence, race, or corporate nature, or any other aspect of its status, to affect either the decision whether to award punitive damages or the decision of

how much to award. This much is needed to prevent juries from believing that, as the law currently tells them, they have total discretion in making punitive damages decisions.

Juries should not be instructed, as they are today, that a second, separate purpose of punitive damages is "to punish."¹⁰ Especially when, as under the current system, the word "punishment" is left undefined and no attempt is made to explain to the jury the relationship between deterrence and punishment or the limits dictated by retributive principles, the articulation of deterrence and punishment as separate purposes can only confuse the jury. In addition, punitive damages awarded to deter will also inflict punishment; the possibility that the articulation of punishment as a separate purpose in jury instructions may in some instances result in a punitive damages award that more closely approximates the retributive ideal cannot justify the greater risk of confusion and unjust verdicts.

Juries also should be instructed that they must consider the deterrent effect of the compensatory damages they award and of harm to the defendant's reputation and business caused by the litigation, by the compensatory award, and by the stigma that attends a punitive award of any size. *See Wheeler, The Constitutional Case for Reforming Punitive Damage Procedures*, 69 Va. L. Rev. 269, 309 (1983) (deterrent effect of compensatory damages); Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1182-83 (1967) (same). The trial court also should inform the jury of the statutory criminal and civil penalties set by the state's legislature for similar wrongful acts, and instruct the jury to con-

¹⁰ Maine, for example, recognizes deterrence, but not punishment, as a legitimate purpose of punitive damages. *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359, 362 (Me. 1982) ("deterrence of the tortfeasor is 'the proper justification' for an award of punitive damages") (quoting *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 345 (1973) (emphasis in original)).

sider those in determining what amount of punitive damages, if any, is needed to achieve the proper deterrence.

In reviewing punitive damages verdicts, courts should be required to consider prior punitive damages awards for similar and dissimilar conduct and to determine whether the relationship between the act and punishment in the case being reviewed is proportional to the relationship between those other acts and punishments. The courts also should look for guidance to the relationships between various acts and punishments established by the legislature in criminal statutes and statutes providing for specific civil penalties, including specified punitive damages, such as double or treble damages. If the reviewing court finds that the punitive damages award being reviewed is substantially disproportionate to the defendant's culpability when compared to those guidelines, the court should not defer to the jury, but should order either remittitur or other relief.

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court prescribed three factors that must be considered in determining the level of procedural protection required before a citizen's life, liberty, or property may be taken under color of law:

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

These considerations strongly support the due process need for more specific punitive damages standards, including those suggested above.

First, the seven-figure verdict in this case and the numerous multi-million-dollar punitive damages verdicts

being awarded with increasing frequency (*see, e.g.*, cases cited in n.4, *supra*) demonstrate conclusively that massive property takings are occurring in punitive damages proceedings. In addition, because the avowed purposes of punitive damages are penal, including to express "social condemnation and disapproval," *In re Paris Air Crash*, 622 F.2d 1315, 1322 (9th Cir.), *cert. denied*, 449 U.S. 976 (1980), punitive damages impose a stigma that requires heightened procedural protection. *See In re Winship*, 397 U.S. 358, 363-64 (1970); *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971); Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 Va. L. Rev. 269, 280-84 (1983).

Second, as already shown, Alabama's vague and standardless punitive damages laws create not just a risk, but a virtual certainty, of arbitrary, discriminatory, and therefore erroneous deprivations of property. *See pp. 10-11, supra*. By reducing the vagueness through specific standards such as those suggested above, Alabama can reduce, at least to some extent, the magnitude of the risk of error.

Finally, reducing the vagueness of the punitive damages laws will promote the government's legitimate penal interests and will do so without any significant fiscal or administrative burden. Indeed, by making punitive damages awards more consistent, more predictable, and less subject to the whim and caprice of unguided juries, governments may promote settlements, reduce the number of lawsuits brought because of the possibility of a windfall punitive damages verdict, reduce the length of trials, reduce the number of appeals, and facilitate judicial review of punitive damages verdicts. *See generally* Wheeler, *supra*, 69 Va. L. Rev. at 303-20.

CONCLUSION

For the foregoing reasons, the judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted,

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN S. AMUNDSON
General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 637-3058

DAVID F. ZOLL
Vice President and General Counsel
CHEMICAL MANUFACTURERS ASSOCIATION
2501 M Street, N.W.
Washington, D.C. 20037
(202) 887-1100

NANCY NORD
AMERICAN CORPORATE COUNSEL ASSOCIATION
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 296-4522

MALCOLM E. WHEELER
Counsel of Record
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM
300 South Grand Avenue
Los Angeles, California 90071
(213) 687-5000
Counsel for Amici Curiae

May 31, 1990

(9)

No. 89-1279

Supreme Court, U.S.

FILED

MAY 31 1989

JOSEPH E. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioners,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF THE
ALABAMA DEFENSE LAWYERS ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Of Counsel:

H. E. NIX, JR.
NIX & HOLTSFORD
Post Office Box 4128
Montgomery, Alabama 36103
President, Alabama Defense
Lawyers Association

DAVIS CARR
HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Post Office Box 123
Mobile, Alabama 36601
(205) 432-5511
Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the constitutional defects in the award of punitive damages against Pacific Mutual were cured by Alabama's judicial review procedure.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	3
I. THE PROBLEM OF PUNITIVE DAMAGES IN ALABAMA	3
II. THE ALABAMA POST-VERDICT REVIEW PROCESS DOES NOT SATISFY DUE PROC- ESS	9
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
<i>Aetna Life Ins. Co. v. Lavoie</i> , 470 So. 2d 1060 (Ala. 1984), vacated and remanded, 475 U.S. 813 (1986), on remand, 505 So. 2d 1050 (Ala. 1987)	2, 3, 7
<i>Alabama Power Co. v. Cantrell</i> , 507 So. 2d 1295 (Ala. 1986), appeal dismissed, 486 U.S. 1028 (1988)	3, 9
<i>Alabama Power Co. v. Capps</i> , 519 So. 2d 1328 (Ala. 1988), appeal dismissed, 486 U.S. 1002 (1988)	3, 8
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	11
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	8, 12
<i>Black Belt Wood Co., Inc. v. Sessions</i> , 514 So. 2d 1249 (Ala. 1986)	9
<i>Bowie v. City of Columbia</i> , 378 U.S. 347 (1964)	11
<i>Central Alabama Elec. Co-op. v. Tapley</i> , 546 So. 2d 371 (Ala. 1989)	5, 6
<i>Charter Hospital of Mobile, Inc. v. Weinberg</i> , 558 So. 2d 909 (Ala. 1990)	6, 8, 11
<i>City Bank of Ala. v. Eskridge</i> , 521 So. 2d 931 (Ala. 1988)	9
<i>Clardy v. Sanders</i> , 551 So. 2d 1057 (Ala. 1989), cert. denied, — U.S. —, 110 S. Ct. 376 (1989)	3
<i>Davison v. Mobile Infirmary</i> , 518 So. 2d 675 (Ala. 1986)	9
<i>Ensor v. Wilson</i> , 519 So. 2d 1244 (Ala. 1987)	9
<i>Fludd v. Dykes</i> , 863 F.2d 822 (11th Cir. 1989), cert. denied, — U.S. —, 110 S. Ct. 201 (1989)	12
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	12
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	12
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972) ..	12
<i>Green Oil Co. v. Hornsby</i> , 539 So. 2d 218 (Ala. 1989)	9-11
<i>Hammond v. City of Gadsden</i> , 493 So. 2d 1374 (Ala. 1986)	9-13
<i>Hayes v. Payne</i> , 523 So. 2d 333 (Ala. 1987)	9

TABLE OF AUTHORITIES—Continued

	Page
<i>HealthAmerica v. Menton</i> , 551 So. 2d 235 (Ala. 1989), cert. denied, — U.S. —, 110 S. Ct. 1166 (1990)	2, 3, 6
<i>Hosey v. Siebels Bruce Group</i> , 363 So. 2d 751 (Ala. 1978)	7
<i>Industrial Chem. & Fiberglass Corp. v. Chandler</i> , 547 So. 2d 812, on application for rehearing, 547 So. 2d 834 (Ala. 1989)	5, 6, 10
<i>John Hancock Variable Life Ins. Co. v. Pierce</i> , 530 So. 2d 719 (Ala. 1987), cert. denied, 486 U.S. 1032 (1988)	10
<i>Land and Associates, Inc. v. Simmons</i> , [Ms. 87-1313, Dec. 22, 1989], — So. 2d — (Ala. 1989)	6, 7
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	12
<i>Nationwide Mut. Ins. Co. v. Clay</i> , 525 So. 2d 1339 (Ala. 1987), cert. denied, — U.S. —, 109 S. Ct. 863 (1989)	3
<i>O'Neal v. Brown</i> , 21 Ala. 482 (1852)	9
<i>Olympia Spa v. Johnson</i> , 547 So. 2d 80 (Ala. 1989)	3, 5-8, 10
<i>Pacifico v. Jackson</i> , [Ms. 87-834, Feb. 20, 1990], — So. 2d — (Ala. 1990)	10
<i>State Farm Fire & Cas. Ins. Co. v. Lynn</i> , 516 So. 2d 1373 (Ala. 1987)	9
<i>Tatum v. Schering Corp.</i> , 523 So. 2d 1042 (Ala. 1988)	5
<i>Terrell v. City of Bessemer</i> , 406 So. 2d 337 (Ala. 1981)	9
<i>Thomas v. Diversified Contractors, Inc.</i> , 551 So. 2d 343 (Ala. 1989)	8, 12
<i>U.S. v. L. Cohen Grocery Co.</i> , 255 U.S. 81 (1921) ..	11
<i>United Am. Ins. Co. v. Brumley</i> , 542 So. 2d 1231 (Ala. 1989)	6
<i>United Services Auto Asso. v. Wade</i> , 544 So. 2d 906 (Ala. 1989)	10
<i>Vintage Enterprises, Inc. v. Jaye</i> , 547 So. 2d 1169 (Ala. 1989), cert. denied, — U.S. —, 110 S. Ct. 377 (1989)	10

TABLE OF AUTHORITIES—Continued

	Page
<i>Washington Nat'l Ins. Co. v. Strickland</i> , 491 So. 2d 872 (Ala. 1985)	7
<i>Wilson v. Dukonia Corp., N.V.</i> , 547 So. 2d 70 (Ala. 1989)	10
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	11
 <i>Other Authorities</i>	
40 Ala. L. Rev. 687-1261 (1989)	4
Ala Code § 6-5-410 (1975)	4
Alabama Pattern Jury Instructions 11.03 (1974) ..	4
Alabama Rules of Civil Procedure 59(a) (1)	8

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioners,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
 ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the
 Supreme Court of Alabama

BRIEF OF THE
 ALABAMA DEFENSE LAWYERS ASSOCIATION
 AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS¹

The Alabama Defense Lawyers Association (hereinafter "ADLA") is a non-profit association of 687 members of the Alabama trial bar who devote a substantial

¹ Pursuant to Rule 36, the parties' letters of consent have been filed with the Clerk.

amount of their professional time to representing defendants in civil lawsuits. Organized in 1964, its purposes include promoting improvements in the adversary system of jurisprudence and the administration of justice.

ADLA members collectively represent a substantial number of civil defendants against whom punitive damages are increasingly sought and awarded in Alabama. The ADLA has appeared as *amicus curiae* in numerous cases involving the constitutionality of large punitive damage awards, including *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), in which this Court recognized that such questions constitute "important issues which . . . must be resolved,"² and *HealthAmerica v. Menton*, 551 So. 2d 235 (Ala. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 1166 (1990).

Despite decisions by this Court questioning the constitutionality of large punitive damage awards, the Alabama Supreme Court has rejected all arguments that the Constitution affords any due process controls on punitive damages in civil cases where there is no fixed statutory limit. Because of the serious and unsettled problem of punitive damages in Alabama, *amicus* is vitally interested in securing plenary review of the question herein presented.

² The case of *Aetna Life Ins. Co. v. Lavoie* involved a \$3.5 million punitive damage award for the alleged bad faith failure to pay \$1,650.00 in health insurance benefits. The judgment was fully affirmed by the Alabama Supreme Court in an opinion authored by a justice who simultaneously was a plaintiff in a separate bad faith lawsuit against another insurer. This Court vacated on grounds of judicial disqualification and did not reach the punitive damages issues. On remand, the Alabama Supreme Court remitted the award to \$500,000.00 505 So.2d 1050 (1987).

SUMMARY OF THE ARGUMENT

The Alabama Defense Lawyers Association files this *amicus* brief to address two arguments of particular significance to Alabama. First, there is a significant problem with punitive damages in Alabama. Second, the Alabama Supreme Court has promulgated a post-verdict review procedure which is ineffective as applied. Moreover, this post-verdict process does not afford the trier of fact guidelines in ascertaining the amount of punitive damages to award.

ARGUMENT

I. THE PROBLEM OF PUNITIVE DAMAGES IN ALABAMA

In recent years, there have been several attempts to bring the problem of punitive damages in Alabama before this Court: *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060 (Ala. 1984), *vacated and remanded*, 475 U.S. 813 (1986), *on remand*, 505 So. 2d 1050 (Ala. 1987); *Alabama Power Co. v. Cantrell*, 507 So. 2d 1295 (Ala. 1986), *appeal dismissed*, 486 U.S. 1028 (1988); *Alabama Power Co. v. Capps*, 519 So. 2d 1328 (Ala. 1988), *appeal dismissed*, 486 U.S. 1002 (1988); *Nationwide Mut. Ins. Co. v. Clay*, 525 So. 2d 1339 (Ala. 1987), *cert. denied*, — U.S. —, 109 S. Ct. 863 (1989); *Olympia Spa v. Johnson*, 547 So. 2d 80 (Ala. 1989), *petition for temporary stay vacated*, [Ms. A-935, May 30, 1989], — U.S. — (1989) (Kennedy, J.); *Clardy v. Sanders*, 551 So. 2d 1057 (Ala. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 376 (1989); *HealthAmerica v. Menton*, 551 So. 2d 235 (Ala. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 1166 (1990). A listing of punitive damage verdicts in Alabama as shown in Appendix A to petitioner's brief, a copy of which is attached for convenience as Appendix A to this brief, illustrates that the problem of punitive damages in Alabama exists in epidemic proportions. Indeed, an entire issue of a recent

Alabama Law Review was devoted exclusively to the topic of punitive damages. 40 *Ala. L. Rev.* 687-1261 (1989). A copy of the index from this issue is attached to this brief as Appendix B.

The source of the unbridled discretion which continually misguides Alabama juries is the approved Alabama Pattern Jury Instruction on punitive damages found at *Alabama Pattern Jury Instructions* 11.03 (1974), which provides:

The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant, and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. The imposition of punitive damages is entirely discretionary with the jury. Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs.

From this charge, skilled plaintiffs' counsel exhort juries to utilize the following pseudo formula in calculating punitive damages. First, determine an amount to punish this defendant. Second, determine an amount to deter this defendant. Third, determine an amount to deter other similarly situated defendants. Add these three figures. All of this fits nicely into the classic "send a message" closing argument, yet affords the trier of fact no guidance whatsoever.

In Alabama, there is no special burden of proof standard for the imposition of punitive damages as opposed to compensatory damages. There is no apportionment of damages among joint tortfeasors. There is no contribution among joint tortfeasors. Our state court has interpreted our Wrongful Death Act, *Ala. Code* § 6-5-410 (1975), as requiring the imposition of punitive damages, *exclusively*, for wrongful deaths. This is true even where the basis of liability for the death is mere negligence.

See, e.g., *Olympia Spa v. Johnson*, 547 So. 2d 80 (Ala. 1989).³

A careful examination of Alabama cases reveals that the Alabama Supreme Court has addressed the constitutionality of punitive damages in only two cases, *Central Alabama Elec. Co-op. v. Tapley*, 546 So. 2d 371 (Ala. 1989) and *Industrial Chem. & Fiberglass Corp. v. Chandler*, 547, So. 2d 812, on application for rehearing, 547 So. 2d 834 (Ala. 1989). In *Tapley* the Court held that the procedural due process arguments were not properly before the Court, and that the substantive due process arguments were satisfied by a post-verdict review process, discussed later in this brief. In *Chandler* the Court first rejected an Eighth Amendment challenge, and on rehearing responded to Fourteenth Amendment due process arguments by observing that admitting evidence of wealth in an effort to provide standards would be too prejudicial, and again referred to the availability of post-verdict procedures as sufficient due process. These are the only two cases in Alabama with a substantive discussion addressing the constitutionality of punitive damages.

While the Alabama Supreme Court has addressed this issue in only these two cases, there is nonetheless commentary found in Alabama Supreme Court opinions, such as that found in the majority's opinion in the present case as quoted below:

Moreover, in a series of recent cases, this Court has rejected the remaining constitutional arguments submitted by Pacific Mutual. (omitting citations)

³ The statute discusses "such damages as the jury may assess." For a view that the Court has misconstrued the type of damages required by our death act, see, *Tatum v. Schering Corp.*, 523 So. 2d 1042, 1047 (Ala. 1988) (Houston, J., dissenting). Since our Court has construed "such damages as the jury may assess" to mean punitive damages, exclusively, the problem of punitive damages becomes even more distressing.

553 So. 2d 537, 543 (Ala. 1989). Four cases are cited by the Court. In three of those cases, the Court did not address the constitutional issues: *United Am. Ins. Co. v. Brumley*, 542 So. 2d 1231, 1238 (Ala. 1989) ("United American's entire argument on those points [constitutional arguments] is one sentence long, too undeveloped to merit serious review by this Court."); *HealthAmerica v. Menton*, 551 So. 2d 235, 247 (Ala. 1989) ("[T]he defendants did not preserve their constitutional issues for appeal."); *Olympia Spa v. Johnson*, 547 So. 2d 80, 86 ("[D]efendants failed to offer a proper objection or to obtain a ruling from which an appeal could be taken [regarding constitutionality of punitive damages]"). The sole case cited by the Court which indeed addressed these constitutional issues is the previously discussed *Industrial Chem. & Fiberglass Corp. v. Chandler*, 547 So. 2d 812, on application for rehearing, 547 So. 2d 834 (Ala. 1989). No mention is made of the *Tapley* case discussed above.

With regard to the constitutionality of punitive damages in Alabama, three members of the Alabama Supreme Court have stated their views that the method for awarding punitive damages in Alabama does not withstand constitutional scrutiny. In the instant case, Justices Maddox and Steagall expressed their views that Alabama's punitive damage procedure is premised upon "wholly standardless discretion." 553 So. 2d at 544.

The third justice, Justice Houston, most recently and most clearly articulated the problems with Alabama's procedure in a concurring opinion in *Charter Hospital of Mobile, Inc. v. Weinberg*, 558 So. 2d 909 (Ala. 1990). Justice Houston specifically recognized that the post-verdict process relied upon so heavily by the Court in *Chandler* as satisfying due process is insufficient. Indeed, it was Justice Houston who, in a concurring opinion, noted in *Land and Associates, Inc. v. Simmons*, [Ms. 87-1313, Dec. 22, 1989], — So. 2d — (Ala. 1989) that punitive damages "are out of hand."

The wide disparity of jury awards for apparently similar misconduct in fraud cases was well illustrated by Justice Houston in the *Simmons* case, just cited. Justice Houston made a comparison of the facts and issues in *Washington Nat'l Ins. Co. v. Strickland*, 491 So. 2d 872 (Ala. 1985) with the facts and issues in *Simmons*. According to Justice Houston, the conduct involved in the two cases was "substantially the same." In *Strickland*, a jury awarded compensatory damages of \$1,369.14, and punitive damages of \$21,130.86, approximately 15½ times compensatory damages. In *Simmons* a jury awarded \$10,000 compensatory damages, and \$2,490,000 in punitive damages, 249 times compensatory damages.

The Alabama Supreme Court's approach to the issues concerning punitive damages in Alabama is further illustrated by two recent decisions. In one case, *Olympia Spa v. Johnson*, 547 So. 2d 80 (Ala. 1989), an objection addressing the constitutionality of punitive damages was raised at trial before the trial court charged the jury, even to the point of citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). Notwithstanding the objection, the trial court charged the jury on punitive damages. The jury returned a \$3 million wrongful death award. Post-trial proceedings focused heavily on the constitutionality of punitive damages, including an appeal to the Alabama Supreme Court fully addressing this issue, as well as a petition for stay of execution to this Court, which was denied. *Petition for temporary stay vacated*, [Ms. A-935, May 30, 1989], — U.S. — (1989). In the opinion released by the Alabama Supreme Court, however, Justice Shores noted that there was nothing for the Court to consider with regard to the question of punitive damages because "no ruling" on the objection was obtained in the trial court. There are three things to note with regard to this ruling.

First, in *Hosey v. Siebels Bruce Group*, 363 So. 2d 751 (Ala. 1978), the same Justice authored an opinion hold-

ing that an objection to a particular proposed jury charge by the trial court was sufficient to preserve an issue for appeal. There is no mention of *Hosey* in *Olympia Spa*.

Second, in *Alabama Power Co. v. Capps*, 519 So. 2d 1328 (Ala. 1988), the Court specifically recognized that an objection to the trial court's charge "during instructions to the jury" would have been sufficient to preserve an issue on the constitutionality of punitive damages. *Id.* at 1330. There was no such objection in *Capps*, but there was in *Olympia Spa*.

Third, Justice Jones authored an opinion applying *Batson v. Kentucky*, 476 U.S. 79 (1986) to civil cases in Alabama, *Thomas v. Diversified Contractors, Inc.*, 551 So. 2d 343 (Ala. 1989). In *Thomas* trial counsel raised a *Batson* objection. Although Justice Jones specifically noted that "the trial judge did not rule on this objection" before empaneling the jury, the absence of a ruling on the objection in *Thomas* did not preclude the Alabama Supreme Court from embracing the proposition that *Batson* applied to civil cases. This position is in stark contrast with the language of Justice Shores that the absence of a specific ruling in *Olympia Spa* precluded review of the constitutional issues raised.

The second case illustrating the approach of the state court regarding the problem of punitive damages is *Charter Hospital of Mobile, Inc. v. Weinberg*, 558 So. 2d 909 (Ala. 1990). In *Weinberg* the Court affirmed that portion of a jury verdict which addressed a compensatory damage award arising out of conversion, but for procedural reasons reversed and remanded for a new trial solely on the issue whether a subsequent jury should additionally award punitive damages on the same cause of action. This unusual approach was undertaken despite *Alabama Rules of Civil Procedure* 59(a)(1), which clearly prohibits the retrial of partial issues, and despite longstanding Alabama case law prohibiting the splitting of a cause of action such as sanctioned by the Court in

Weinberg. O'Neal v. Brown, 21 Ala. 482 (1852); *Terrell v. City of Bessemer*, 406 So. 2d 337 (Ala. 1981).

The foregoing analysis illustrates the approaches taken by the Alabama Supreme Court to the problem of punitive damages in the past few years.

II. THE ALABAMA POST-VERDICT REVIEW PROCESS DOES NOT SATISFY DUE PROCESS

In cases discussed in the preceding section, the Alabama Supreme Court has touted its opinions in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986) and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989) as satisfying due process requirements in a post-verdict review by the trial court. Two observations are pertinent.

First, a review of all reported opinions by the Alabama Supreme Court wherein the trial court's *Hammond* findings are set forth reveal that the *Hammond* procedure is form without substance. The following list should contain all reported decisions by the Court in which the entire *Hammond* findings are recited, as of the time this brief went to print, in chronological order: *Alabama Power Co. v. Cantrell*, 507 So. 2d 1295 (Ala. 1987) (on return after remand) (\$1 million electrocution death verdict left undisturbed); *Black Belt Wood Co., Inc. v. Sessions*, 514 So. 2d 1249 (Ala. 1986) (on return after remand) (\$3.5 million accidental death verdict left undisturbed); *State Farm Fire & Cas. Ins. Co. v. Lynn*, 516 So. 2d 1373 (Ala. 1987) (on return after remand) (\$250,000 insurance fraud verdict left undisturbed); *Davison v. Mobile Infirmary*, 518 So. 2d 675 (Ala. 1986) (on return after remand) (refusing to accept trial court's remittitur from \$8 million to \$1.35 million); *Ensor v. Wilson*, 519 So. 2d 1244 (Ala. 1987) (on return after remand) (\$2.5 million verdict for brain damaged baby left undisturbed); *City Bank of Ala. v. Eskridge*, 521 So. 2d 931 (Ala. 1988) (\$62,500 verdict for fraud in suit versus bank left undisturbed); *Hayes v. Payne*, 523

So. 2d 333 (Ala. 1987) (on return after remand) (\$140,000 fraud verdict affirmed); *John Hancock Variable Life Ins. Co. v. Pierce*, 530 So. 2d 719 (Ala. 1987), cert. denied, 486 U.S. 1032 (1988) (on return after remand) (affirming \$150,000 punitive damages in fraud action against insurance company); *United Services Auto Asso. v. Wade*, 544 So. 2d 906 (Ala. 1989) (remitting \$3.5 million bad faith award by \$1 million); *Olympia Spa v. Johnson*, 547 So. 2d 80 (Ala. 1989) (\$3 million death award sustained); *Industrial Chem. and Fiberglass Corp. v. Chandler*, 547 So. 2d 812 (Ala. 1989) (on return after remand) (two \$2.5 million wrongful death verdicts left undisturbed); *Vintage Enterprises, Inc. v. Jaye*, 547 So. 2d 1169 (Ala. 1989), cert. denied, — U.S. —, 110 S. Ct. 377 (1989) (affirming \$500,000 punitive damage award for breach of warranty and fraud in connection with sale of mobile home); and *Pacifico v. Jackson*, [Ms. 87-834, Feb. 2, 1990], — So. 2d — (Ala. 1990) (reinstating jury award of \$1,650,000 in a medical malpractice case). There are two cases in which the Alabama Supreme Court has reduced punitive damage awards pursuant to an extension of *Hammond*: *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989) (affirming remittitur of \$125,000 on a \$150,000 fraud verdict) (quoting with approval the trial judge's observation that "it doesn't take a large verdict to be heard and felt a few miles down the road in Union Springs by two local individuals"); and *Wilson v. Dukonia Corp., N.V.*, 547 So. 2d 70 (Ala. 1989) (setting aside an entire \$21,000 punitive damage award against an individual because of his abject poverty).

The lack of effect given *Hammond* in the instant case illustrates the foregoing observations. 553 So. 2d at 543.

More significantly, a post-verdict procedure wherein the trial court, and not the jury, "tinkers with" the verdict does not satisfy defendant's constitutional rights to have standards applied by the trier of fact rendering the

verdict. As even the Alabama Supreme Court has recognized, "it is possible for a verdict to be excessive even when it is the result of a properly functioning jury." *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989). As further noted in that case, "it is possible for a jury to hear the evidence in a case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of those goals." *Id.*

Indeed, in the case before this Court, Justices Maddox and Steagall, in a separate opinion, specifically noted that the *Hammond* process is not sufficient to accord litigants "all the due process protection the Constitution envisions." 553 So. 2d at 545. A third member of the Alabama Supreme Court has likewise reached this conclusion. *Charter Hospital of Mobile, Inc. v. Weinberg*, 558 So. 2d 909 (Ala. 1990) (Houston, J., concurring).

This Court addressed the necessity of specific guidelines or rules by which the impartial execution of laws could be secured as early as 1885. *Yick Wo v. Hopkins*, 118 U.S. 356, 372-73 (1886). It is impressive to recognize the broad variety of circumstances wherein this Court has carefully scrutinized governmental activity in the context of due process and whether there were adequate guidelines for the enforcement of penalties: *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (striking down legislation which was the equivalent of a "statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury") (recall the Alabama Pattern Jury Charge on punitive damages quoted earlier in this brief); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (holding unconstitutionally vague a state law requiring a loyalty oath of teachers); *Bowie v. City of Columbia*, 378 U.S. 347, 353 (1964) (holding application of state criminal trespass laws unconstitutionally vague and violative of due process because of "in-

adequate guidance to the triers of fact"); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (extensive discussion of procedural due process required for notice and hearing in connection with termination of benefits pursuant to a federal aid program); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) ("laws must provide explicit standards for those who apply them") ("a vague law impermissibly delegates basic policy matters to . . . juries for resolution on an ad hoc and subjective basis."); and *Mathews v. Eldridge*, 424 U.S. 319 (1976) (addressing procedural due process adequacy of pre-termination hearing prior to termination of disability benefits). Some of the preceding cases demonstrate microscopic examination of whether adequate guidelines were provided to the trier of fact and hence whether due process was afforded.

The most striking recent example, however, of the Court's concern about a lack of meaningful standards for the trier of fact is with regard to the imposition of capital punishment. *Furman v. Georgia*, 408 U.S. 238 (1972). *Furman* should not be dismissed as a criminal case. In Alabama, the due process clause has been held to be the constitutional underpinning for applying *Batson v. Kentucky*, 476 U.S. 79 (1986) to civil cases. *Thomas v. Diversified Contractors, Inc.*, 551 So. 2d 343 (Ala. 1989). *Accord: Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 201 (1989). The fact *Batson* was a criminal case was no bar to holding that civil litigants are entitled to the same process due criminal litigants. Indeed, the due process clause itself makes no distinction between civil and criminal cases. Thus posed, the question is simply whether criminal defendants are entitled to more due process than civil defendants in the area of guidelines for the imposition of punishment. Surely the answer must be that civil litigants are entitled to the same requirement of adequate guidelines for the imposition of punishment as criminal defendants. This is particularly true given the fact that we are dealing with punitive

damages which are designed to serve a punishment effect. For this reason, the *Hamond* procedure does not address the total absence of guidelines provided the trier of fact in Alabama in the assessment of punishment: punitive damages. The *Hammond* procedure, therefore, is constitutionally deficient.

CONCLUSION

There is a significant problem with the imposition of punitive damages in Alabama. The *Hammond* post-verdict review procedure has not resulted in any meaningful modification of the law, and does not satisfy a defendant's due process rights in providing a jury standards by which to award punitive damages.

Respectfully submitted,

Of Counsel:

H. E. NIX, JR.

NIX & HOLTSFORD

Post Office Box 4128

Montgomery, Alabama 36103

President, Alabama Defense

Lawyers Association

DAVIS CARR

HAND, ARENDALL, BEDSOLE,

GREAVES & JOHNSTON

Post Office Box 123

Mobile, Alabama 36601

(205) 432-5511

Counsel for Amicus Curiae

APPENDICES

APPENDIX A

PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES OF \$500,000 OR
MORE FROM JANUARY 1, 1990 TO APRIL 30, 1990

(* indicates wrongful death case)

1990

1. *Wilburn v. Luxaire, et al.* \$50,000,000 *
Mobile County Circuit Court
CV-88-147 et seq. (April, 1990)
\$50,000,000 punitive damages, plus
previous settlement of \$11,500,000 for
wrongful death of five-member family
resulting from alleged negligence involving
heating unit.
2. *Sue Chumney as Administrator of the* 3,000,000 *
Estate of Christopher E. Long, deceased v.
Flowers Hospital
Houston County Circuit Court
CV-87-587 (1990)
Wrongful death of child.
Settled post-trial.
3. *Tate v. P.P.G. Industries* 2,500,00 *
U.S. District Court for the Southern
District of Alabama (February 19, 1990)
Punitive damages for wantonness in
wrongful death case.
4. *Carter v. Old American Insurance Company* 1,400,000
Lauderdale County Circuit Court (April,
1990)
\$1,400,000 punitive damages for bad faith
non-payment of health insurance claim.
See 544 So.2d 917 (Ala. 1989) wherein
summary judgment for the insurer was
reversed.

5. *Burden v. Empire Fire & Marine Ins. Co.* 1,400,000
Lauderdale County Circuit Court
CV-88-244 (March 2, 1990)
Alleged bad faith for failing to settle
uninsured motorist claim. \$400,000
awarded for compensatory damages and
\$1,000,000 for punitive damages.
Post-trial motions pending.
6. *American Employers Insurance Company* \$1,150,000
v. Southern Seeding Services, Inc., et al.
U.S. District Court for the Northern
District of Alabama CV 87-G-0294S
Verdict awarding \$400,000 in
compensatory damages and \$750,000 in
punitive damages on February 22, 1990.
Appeal filed 3/27/90.
7. *Braden v. Dorsey Motor Sales, Inc.* 1,000,000
Autauga County Circuit Court (April 3,
1990)
\$1,000,000 punitive damages, \$15,6000
compensatory damages for alleged
fraudulent misrepresentation by car dealer
that a used car was "new".
8. *William Thornton v. Yamaha Motor Co.,* 750,000 *
Ltd., et al
Montgomery County Circuit Court
CV-88-1639-TM (April 18, 1990)
Wrongful death.
No appeal pending.

PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES OF \$500,000 OR
MORE FROM JANUARY 1, 1989 TO DECEMBER 31, 1989

(* indicates wrongful death case)

1989

1. *Braswell v. Conagra* \$13,150,000
U.S. District Court for Middle District
of Alabama (Southern Division)
88-00741-T-S (November, 1989)
Breach of contract and fraud. \$4,050,000
in compensatory damages and \$1,100,000
in punitive damages.
Appeal pending.
2. *Sigafoose, v. Babson Brothers Co.* 10,000,000
Baldwin County Circuit Court
CV-86-573 (1989)
\$10 million punitive damages for fraud
involving \$21,000 compensatory claim.
Settled post-trial
3. *Robbins v. State Farm Mut. Auto. Ins. Co.* \$5,000,000
541 So.2d 477 (Ala. 1989)
Macon County
\$5 million punitive damages for bad faith
and fraud involving \$700 disability claim.
Remitted to \$500,000. Affirmed by
Alabama Supreme Court.
4. *Thornton v. Knollwood Park Hospital* \$5,000,000 *
Mobile County Circuit Court
CV-85-1275 (1989)
Wrongful death.
Settled on Appeal
5. *Turner v. Alabama Power Company* 4,000,000 *
Montgomery County Circuit Court
CV-88-1700-PH (August 30, 1989).
Wrongful death suit.
Appeal pending.

6. *United Serv. Auto Ass'n v. Wade* \$3,500,000
544 So.2d 906 (Ala. 1989)
Walker County
\$3.5 million non-jury punitive damages
verdict for bad faith remitted to \$2.5
million.
Compensatory damages of \$166,795 plus
\$21,962 on contract count.
Appeal pending.
7. *Ford v. Colonial Mortgage Co.* 3,000,000
Russell County Circuit Court
CV-89-010 (November 1989)
Punitive damages for fraudulent breach of
residential home loan commitment
Appeal pending
8. *Lindblom v. Intercontinental Life Ins. Co.* 3,000,000
Jefferson County Circuit Court
CV-86-7156 (1989)
Bad faith & fraud involving \$10,000
death benefit
Appeal pending
9. *Olympia Spa v. Johnson* 3,000,000 *
547 So.2d 80 (Ala. 1989)
Mobile County
Wrongful death
Affirmed by Alabama Supreme Court
10. *Land & Associates, Inc. v. Simmons* 2,500,000
[Ms. 87-1313, December 22, 1989]
— So.2d — (1989)
Mobile County
Fraud involving \$10,000 in life insurance
proceeds
Affirmed by Alabama Supreme Court
11. *Majid Jahandarfard, et al v. Lomax* 2,500,000 *
Killough, et al
Madison County Circuit Court
CV88-1269P (November 8, 1989)
Wrongful Death.
Appeal pending.

12. *Pettus, Estate of v. Vari-Care* 2,500,000 *
Mobile County Circuit Court
CV-86-196 (June 20, 1989)
Wrongful death.
Appeal pending.
13. *Blackburn, et al. v. Altus Bank* \$2,038,753
Mobile County Circuit Court
CV-88-2263 (November 30, 1989)
Alleged fraud. Two plaintiffs.
\$1,538,753 for one plaintiff, \$500,000
for other plaintiff.
Appeal pending.
14. *White, et al v. Georgia Casualty Insurance* 2,000,000
Co.
Barbour County Circuit Court, Clayton
Division
CV-84-037 (June 28, 1989)
Bad faith action.
Appeal pending.
15. *Stoval, Estate of v. Montgomery Health* 2,000,000 *
Care et al.
Montgomery County Circuit Court
CV87-173-TH (1989)
Wrongful death
16. *HealthAmerica, et al. v. Menton* 1,800,000
551 So.2d 235 (Ala. 1989)
Mobile County
Fraud involving \$2,400 claim for medical
benefits.
Affirmed by Alabama Supreme Court;
Cert. denied by Supreme Court of
United States
17. *Phillips v. United American Ins. Co.* 1,800,000
Etowah County Circuit Court
CV-87-132JSS (June 2, 1989)
Bad faith and fraud involving \$264 unpaid
balance on medical claim.
Settled post-trial

6a

18. *Turner v. Deutz-Allis Credit Corporation* 1,609,500
Barbour County, Clayton Division
CV-85-043 (October 9, 1989)
No post-trial relief. Appeal pending.
19. *Beyer v. Beech Aircraft Corp* 1,500,000 *
Jefferson County Circuit Court
CV-81-2120 (1989)
Wrongful death
20. *Terry v. John Carner and Leisure American, Inc.* \$1,500,000
Jefferson County Circuit Court
CV 85-6777 (November 1, 1989)
Fraud claim involving \$5,500 actual damages.
Settled prior to appeal
21. *Porter v. Hook* 1,300,000
554 So.2d 382 (Ala. 1989)
Jackson County
Action for breach of written contracts.
Breach of unwritten joint venture agreement and fraud against cable television owner.
Remitted to \$300,000 by trial court.
Full verdict reinstated by Supreme Court of Alabama.
22. *Central Alabama Electric Coop v. Tapley* 1,000,000 *
546 So.2d 371 (Ala. 1989)
Tallapoosa County
Wrongful death.
Affirmed by Alabama Supreme Court
23. *Pacific Mutual Life Ins. Co. v. Haslip* 1,000,000
[Ms. 87-842, Sept. 13, 1989]
553 So.2d 537 (Ala. 1989)
Fraud. Affirmed by Alabama Supreme Court.
Cert. granted by Supreme Court of United States.

7a

24. *Carlis v. Ft. Deposit Motor Co., et al* 1,000,000
Macon County Circuit Court
CV-87-30 (April 19, 1989)
Fraud involving sale of credit life insurance; approximately \$1,000 compensatory damages.
\$1,000,000 remitted to \$250,000.
Appeal pending
25. *Shelby County v. Bailey* 1,000,000 *
545 So.2d 743 (Ala. 1989)
Jefferson County
Wrongful death—\$500,000 each for two deaths.
Affirmed by Alabama Supreme Court.
26. *United American Ins. Co. v. Brumley* \$1,000,000
542 So.2d 1231 (Ala. 1989)
Marion County
Bad faith involving compensatory damages of \$5,000.
Affirmed by Alabama Supreme Court.
Rehearing denied.
27. *Battles' Entertainment, Inc. v. First Federal Savings & Loan Association of Russell County, et al.* 800,000
Lee County Circuit Court
CV-88-083 (April 20, 1989)
Fraud in connection with a sale of real estate.
Settled post-trial.
28. *Robert McDonald v. Continental Casualty Company (CNA)* 750,000
Houston County Circuit Court
(March 9, 1989)
Alleged tort of outrage due to late payment of workmen's compensation benefits.
Motions for J.N.O.V. and/or remittitur denied by trial court.
Appeal pending.

29. *Thomas v. Principal Mut. Ins. Co.* 750,000
 Mobile County Circuit Court
 CV-85-1275 (1989)
 Bad faith failure to pay \$1,000 death benefit
 Set aside by trial court on defendant's motion for J.N.O.V.—Appeal pending
30. *Lombus v. Mitchell Transport, Inc., et al* 600,000 *
 Talladega County Circuit Court
 CV-89-90 (19—)
 Wrongful death.
 Post-trial motions filed.
31. *Harris v. M & S Toyota, Inc.* 500,000
 Jefferson County Circuit Court
 CV-86-1344 (August 22, 1989)
 Alleged fraud involving sale of used car.
 Verdict set aside on J.N.O.V.
 Appeal pending.
32. *Mallory v. Hobbs Trailers* \$500,000 *
 554 So.2d 966 (Ala. September 29, 1989)
 Jefferson County
 Wrongful death.
 Trial court granted defendant's motion for J.N.O.V.
 Original verdict reinstated by Supreme Court of Alabama.
 Rehearing denied.
33. *Vintage Enterprises v. Jaye* 500,000
 547 So.2d 1169 (Ala. 1989)
 Tallapoosa County
 \$500,000 punitive damages and \$20,000 compensatory, relating to sale, order, delivery of mobile home, fraud, wantonness, negligence, warranty and Magnuson-Moss theories.
 Affirmed by Alabama Supreme Court.

34. *Watson, Watson & Rutland v. Rosser Fabrap Int'l* 500,000
 U.S. District Court for Middle District of Alabama
 88-H-1292-N (M.D. Ala. 1989)
 Intentional interference with business relationship.
 Post-trial motion pending

PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES OF \$500,000 OR
MORE FROM JANUARY 1, 1988 TO DECEMBER 31, 1988

(* indicates wrongful death case)

1988

1. *Turner v. Southern Life & Health Ins. Co.* \$5,000,000
Macon County Circuit Court
CV-87-91 (1988)
Punitive damages for bad faith and fraud
involving \$1,000 death benefits.
Remitted to \$500,000.
Appeal pending.
2. *Industrial Chemical & Fiberglass v. Chandler* 2,500,000 *
1,250,000
547 So.2d 812 (Ala. 1988)
Jefferson County
\$3,750,000 punitive damages—\$2.5 million
for wrongful death and \$1.5 million for
breach of warranty
Affirmed by Alabama Supreme Court
3. *Industrial Chemical & Fiberglass v. Ensley* 2,500,000 *
1,250,000
547 So.2d 812 (Ala. 1988)
Jefferson County
\$3.75 million—\$2.5 million for wrongful
death and \$1.25 million for breach of
warranty
Affirmed by Alabama Supreme Court
4. *Heathcoat v. Mitchell, Potts, et al.* 3,000,000 *
U.S. District Court for the Northern
District of Alabama
Case No. 85-7805, 85-7288 (1988)
Wrongful death
5. *Clardy v. Sanders* 2,750,000 *
551 So.2d 1057 (Ala. 1989)
Montgomery County (January 15, 1988)
Wrongful death.
Affirmed by Alabama Supreme Court.

6. *Proctor & Gamble Co. v. Staples* \$2,750,000 *
551 So.2d 949 (Ala. 1989)
Colbert County (March 2, 1988)
Wrongful death.
Reversed on appeal. Settled thereafter.
7. *Walls v. Colonial Mortgage Co.* 1,700,000
Russell County Circuit Court
CV87-194 (1988)
Fraud involving breach of residential home
loan commitment; compensatory damages
of \$2,500 or less.
Settled pending appeal
8. *Trawick v. Michaels of Oregon Co.* 1,000,000
U.S. District Court for Middle District of
Alabama
88-C-413N (December 21, 1988)
Products liability involving rifle swivel.
Appeal pending on certified question of
Alabama Supreme Court.
9. *Williams v. Rust International* 1,000,000 *
Jefferson County Circuit Court
CV-82-174 (1988)
Wrongful death
10. *Achord v. Momar, Incorporated* 863,625
United States District Court for the Middle
District of Alabama, Northern Division
No. 87-D-0824-N (September 6, 1988)
Products liability suit. Verdict includes
\$500,000 punitive damages.
No appeal.
11. *Carner, et al v. Commercial Union Insurance Company, et al.* 811,804
Jefferson County Circuit Court
CV-82-3504 (1988)
Breach of contract and bad faith

12a

- | | | |
|-----|---|-------------|
| 12. | <i>Ramsey Health Care, Inc. v. Follmer</i>
24 ABR 1321
Jefferson County Circuit Court
CV-87-7215
Alleged fraud.
Affirmed by Alabama Supreme Court. | 800,000 |
| 13. | <i>Alabama Power Co. v. Courtney</i>
539 So.2d 170 (Ala. 1988)
Chilton County
Wrongful death.
Affirmed by Alabama Supreme Court. | \$750,000 * |
| 14. | <i>Consolidated Freightways v. Pacheco-Rivera</i>
524 So.2d 346 (Ala. 1988)
Jefferson County
Wrongful death. | 525,000 * |
| 15. | <i>Alabama Farm Bureau v. Hixon</i>
533 So.2d 518 (Ala. 1988)
Montgomery County
Wrongful death.
Reversed on appeal. | 500,000 * |
| 16. | <i>Alabama Power Co. v. Capps</i>
519 So.2d 1328 (Ala. 1988)
Butler County
Wrongful death.
Affirmed by Alabama Supreme Court. | 500,000 * |
| 17. | <i>L. W. Johnson & Assoc. v. Rivers Const. Co.</i>
532 So.2d 618 (Ala. 1988)
Marion County
Fraud action by construction county
against developer involving \$165,000
compensatory damages
Affirmed by Alabama Supreme Court | 500,000 |

13a

PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES OF \$500,000 OR
MORE FROM JANUARY 1, 1987 TO DECEMBER 31, 1987

(* indicates wrongful death case)

1987

- | | | |
|----|---|------------------------|
| 1. | <i>Dale, Estate of v. Griffin, Dept. of Mental Health</i>
Montgomery County Circuit Court
CV85-138-K (1987)
Wrongful death | \$11,701,372 * |
| 2. | <i>Esstate of Jackson v. Phillips Petroleum Co.</i>
676 F. Supp. 1142 (S.D. Ala. 1987)
Reduced punitive damages from
\$5,041,694.04 to \$300,000 in one case, and
from \$2,519,439.85 to \$150,000 in another.
Claim for conversion, intentional
interference with contractual relations and
wrongful exercise of lien rights.
New trial granted on refusal to remit
punitive damages. | 5,100,000
2,550,000 |
| 3. | <i>Super Valu Stores, Inc. v. Peterson</i>
506 So.2d 317 (Ala. 1987)
Etowah County
Breach of contract and fraud in
employment relationship.
Affirmed by Alabama Supreme Court | 5,000,000 |
| 4. | <i>Aetna Life Ins. Co. v. Lavoie</i>
505 So.2d 1050 (Ala. 1987)
Mobile County
\$3 million punitive damages for bad
faith refusal to pay \$1,650 medical claim.
Initially affirmed by Alabama Supreme
Court, then vacated on appeal to U.S.
Supreme Court and thereafter remitted to
\$500,000 by Alabama Supreme Court
and affirmed. | 3,500,000 |

5. *State Farm Mutual Automobile Insurance v. Hollis, Adm.* \$1,500,000
ABR 87-808
Coffee County Circuit Court
CV-853 (1987)
Bad faith claim alleging negligence or
wanton failure to settle lawsuit and
wanton failure to file supersedeas bond.
Reversed and remanded for new trial.
6. *Talmage v. Humana Hospital Florence, et al* 1,500,000 *
Lauderdale County Circuit Court
CV-85-135 (September 10, 1987)
Wrongful death.
Settled post-trial.
7. *Curry, Estate of v. Alabama Gas, et al* 1,250,000 *
Montgomery County Circuit Court
CV86-323-G (1987)
Wrongful death
8. *North Carolina Mut. Life Ins. Co. v. Holley* 1,000,000—
533 So.2d 497 (Ala. 1987)
Tallapoosa County
Bad faith.
Remitted to \$500,000 by Alabama
Supreme Court.
9. *Best Plant Food Products, Inc. v. Cagle* 972,000
510 So.2d (Ala. 1987)
Jackson County
Breach of warranty/fraud/deceit.
Affirmed by Alabama Supreme Court.
10. *Hixon v. Village West Trailer Park* 750,000 *
Montgomery County Circuit Court
CV-84-1447-PR (February 4, 1987)
Wrongful death.
Reversed and rendered on appeal.

11. *Harmon v. Motors Ins. Corp.* 500,000
493 So.2d 1370 after remand 525 So.2d
411 (1987)
Calhoun County
\$500,000 punitive damages for fraud
remitted to \$40,000.
Affirmed conditionally

PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES OF \$500,000 OR
MORE FROM JANUARY 1, 1986 TO DECEMBER 31, 1986

(* indicates wrongful death case)

1986

1. *Davison v. Mobile Infirmary* \$8,000,000
518 So.2d 675 (Ala. 1986)
Mobile County
\$8 million punitive damages for medical
malpractice remitted to \$1,350,000
2. *Beck, Murray, Tull v. Piper Aircraft, et al.* 5,175,000 *
Jefferson County Circuit Court
CV-83-6266 (1986)
Wrongful death.
3. *Black Belt Wood Yard v. Sessions* 3,500,000 *
514 So.2d 1249 (Ala. 1986)
Jefferson County
Wrongful death.
Affirmed by Alabama Supreme Court
4. *Patricia L. Crandall, et al. v. Rudolph V. Williams* 3,035,000 *
514 So.2d 1267 (Ala. 1987)
Madison County Circuit Court
CV-85-461, CV-85-379 consolidated
(January 13, 1986)
One death—\$500,000; one personal injury—
\$2,500,000 (compensatory and punitive—
general verdict); two personal injuries—
\$2,500 each (compensatory and punitive—
general verdict); one subrogation—\$30,000.
Affirmed.
5. *Treadwell Ford, Inc. v. Campbell* \$1,000,000 *
485 So.2d 312 (Ala. 1986) 350,000
Mobile County
Three plaintiffs—\$1,000,000 wrongful
death; \$60,000 negligence; and \$350,000
which included compensatory damages and

punitive damages for fraud involving a
defect in the accelerator of a pickup truck.
Affirmed by Alabama Supreme Court.
Appeal dismissed by 486 U.S. 1028, 108
S.Ct. 2097, 100 L.Ed.2d 596
(U.S. Ala., May 31, 1988)

6. *Alabama Power Co. v. Cantrell* 1,000,000 *
507 So.2d 1295 (Ala. 1986)
St. Clair County
Wrongful death.
Affirmed by Alabama Supreme Court.
Appeal dismissed by 486 U.S. 1028, 108
S.Ct. 2008, 100 L.Ed.2d 596
U.S. Ala., May 31, 1988)
7. *AmSouth Bank v. Speigner* 1,000,000 *
505 So.2d 1030 (Ala. 1986)
Elmore County
Wrongful completion, cashing of \$25,000
check.
Settled on appeal.
8. *Rollison Logging Company of Alabama, Inc. v. John Ellis, et al.* 1,000,000
Cherokee County Circuit Court
CV-84-03 (May 12, 1986)
Alleged fraud involving proposed purchase
of logging equipment. Compensatory
damages in the amount of \$78,416 and
punitive damages in the amount of \$921,584.
Remitted to \$200,000

**PARTIAL LIST OF ALABAMA JURY VERDICTS
AWARDING PUNITIVE DAMAGES OF \$500,000 OR
MORE FROM JANUARY 1, 1985 TO DECEMBER 31, 1985**

(* indicates wrongful death case)

1985

1. *Holt v. State Farm Mutual Auto Ins. Co.* \$25,000,000
Clay County Circuit Court
CV-82-060 (1985)
Fraud involving UM stacking; \$10,000
contract claim
Settled post-trial
2. *McMillian v. Massey Ferguson, Inc., et al.* 10,500,000
Mobile County Circuit Court
CV-82-686 (1985)
\$10.5 million general verdict which included
\$584,000 actual damages for partial leg
amputation caused by alleged wanton-
ness in design & manufacture of grain
auger. Settled pending appeal
3. *General Motors Corp. v. Edwards* 4,000,000 *
482 So.2d 1176 (Ala. 1985)
Jefferson County
Two plaintiffs at \$2 million each
Remitted by trial court to \$1.4 million each
Affirmed by Alabama Supreme Court
Overruled by *Schwartz v. Volvo North Ameri-
can Corp.*, 554 So.2d 927, 58 U.S.L.W. 2132
(Ala. July 28, 1989)
4. *May v. Lloyd Noland Foundation* 4,000,000 *
Jefferson County Circuit Court
CV-79-583 (1985)
Wrongful death
Settled Post-Trial
5. *Wright v. Superior Gas* 3,600,000 *
Macon County Circuit Court
CV-84-47 (1985)
Wrongful death.
Settled post-trial

6. *American Pioneer Life Ins. Co. v. Sandlin* \$3,000,000
470 So.2d 657 (Ala. 1985)
Marion County
\$3 million punitive damages for fraud in-
volving \$100,000 compensatory damages.
Affirmed by Alabama Supreme Court.
7. *Pasquale Food Co. v. Shakey's Inc.* 3,000,000
Jefferson County Circuit Court
CV-82-2606 (1985)
Punitive damages for intentional interference
with business relationship and improper
acquisition of trade secrets.
8. *Hudson v. K&S Industries, Inc.* 2,000,000 *
Montgomery County Circuit Court
CV-84-593 (1985)
Wrongful death
9. *Nationwide Mut. Ins. Co. v. Clay* 1,250,000
469 So.2d 533 (Ala. 1985)
Mobile County
Bad faith involving \$40,000 disability claim.
Affirmed by Alabama Supreme Court.
10. *Kathy Dunaway, as Mother and Custodial
Parent of Daniel Allen Dunaway, a Minor,
v. Alabama Power Company* 500,000 *
Montgomery County Circuit Court
CV-84-650-PR (December 13, 1985)
Wrongful death
Appealed. JNOV for Defendant on 4/02/87.
(Reversed)

APPENDIX B

ALABAMA LAW REVIEW

VOLUME 40 SPRING 1989 NUMBER 3

Contents

SYMPOSIUM: PUNITIVE DAMAGES

PUNITIVE DAMAGES: INTRODUCTION AND SYNOPSIS	
<i>Harold See</i>	687
THE MORAL FOUNDATION OF PUNITIVE DAMAGES	
<i>David G. Owen</i>	705
PUNITIVE DAMAGES: DIVERGENCE IN SEARCH OF A RATIONALE	
<i>Bruce Chapman and Michael Trebilcock</i>	741
ENDING PUNISHMENT IN "PUNITIVE" DAMAGES: DETERRENCE-MEASURED REMEDIES	
<i>Dan B. Bobbs</i>	831
A PROPOSAL FOR FURTHER COMMON LAW DEVELOPMENT OF THE USE OF PUNITIVE DAMAGES IN MODERN PRODUCT LIABILITY LITIGATION	
<i>Malcolm E. Wheeler</i>	919
PUNITIVE DAMAGES, DUE PROCESS, AND THE JURY	
<i>Dorsey D. Ellis, Jr.</i>	975
INSURABILITY AND PUNITIVE DAMAGES	
<i>George L. Priest</i>	1009
NO-FAULT PUNISHMENT	
<i>Peter Huber</i>	1037
WHY PUNITIVE DAMAGES DON'T DETER CORPORATE MISCONDUCT EFFECTIVELY	
<i>E. Donald Elliott</i>	1053
COMMENTS ON <i>Why Punitive Damages Don't Deter Corporate Misconduct Effectively</i>	
<i>Michael Wells</i>	1073

REREADING PUNITIVE DAMAGES: BEYOND THE
PUBLIC/PRIVATE DISTINCTION*Angela P. Harris* 1079A COMMENT ON PROPOSALS FOR DETERMINING
AMOUNTS OF PUNITIVE AWARDS*Jerry J. Phillips* 1117AN ECONOMIC EXPLANATION OF PUNITIVE
DAMAGES*David Friedman* 1125PUNITIVE DAMAGES FOR DETERRENCE: WHEN
AND HOW MUCH?*Robert D. Cooter* 1143PUNITIVE DAMAGES AND SUBJECTIVE STATES OF
MIND: A POSITIVE ECONOMIC THEORY*Mark F. Grady* 1197

PUNITIVE DAMAGES: A SUPPORTING THEORY

Harold See 1227AFTERWORD—*Browning-Ferris*: THE SUPREME
COURT'S EMERGING MAJORITIES*Gary T. Schwartz* 1237

(10)
No. 89-1279
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Supreme Court, U.S.

FILED

MAY 31 1990

JOSEPH F. SPANIOLO, JR.
CLERK

PACIFIC MUTUAL LIFE INSURANCE
COMPANY,

Petitioner,

-against-

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF FOR AMICUS CURIAE,
THE CITY OF NEW YORK

VICTOR A. KOVNER,
Corporation Counsel,
Attorney for Amicus Curiae,
The City of New York,
100 Church Street,
New York, New York 10007.
(212) 566-4699 and 566-8306

LEONARD J. KOERNER,*
PAMELA SEIDER DOLGOW,
JOHN HOGROGIAN,
of Counsel.

*Counsel of Record.
June 1, 1990

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE....	1
SUMMARY OF ARGUMENT	8
ARGUMENT	
THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT JURIES BE GIVEN WORKABLE STANDARDS TO GUIDE THEIR DISCRETION IN AWARDING PUNITIVE DAMAGES IN CIVIL CASES. DUE PROCESS FURTHER REQUIRES THAT SUCH AWARDS BE PROPORTIONATE TO THE CONDUCT BEING PUNISHED. ..	9
CONCLUSION	17

TABLE OF AUTHORITIES

	Page
<u>Cases:</u>	
<u>Aetna Life Insurance Co.</u> <u>v. Lavoie</u> , 475 U.S. 813 (1986)	2-3
<u>Bankers Life and Casualty</u> <u>Co. v. Crenshaw</u> , 486 U.S. 71 (1988)	3, 10
<u>Browning-Ferris Industries</u> <u>of Vermont v. Kelco Disposal</u> , ___ U.S. ___, 109 S. Ct. 2909 (1989)	3, 10-11
<u>City of Newport v. Fact</u> <u>Concerns</u> , 453 U.S. 247 (1981)	4
<u>Gertz v. Robert Welch,</u> <u>Inc.</u> , 418 U.S. 323 (1974) ...	15
<u>Ismail v. Cohen</u> , 899 F.2d 183 (2d Cir. 1990)	7
<u>Lassiter v. Department</u> <u>of Social Services</u> , 452 U.S. 18 (1981)	12
<u>Lugar v. Edmondson Oil</u> <u>Co.</u> , 457 U.S. 922 (1982) ...	11
<u>Nardelli v. Stamberg</u> , 44 N.Y.2d 500, 406 N.Y.S. 2d 443 (1978)	15-16
<u>North Georgia Finishing</u> <u>v. Di-Chem, Inc.</u> , 419 U.S. 601 (1975)	11

<u>Pacific Mutual Life Insurance</u> <u>Co. v. Haslip</u> , 553 So.2d 537 (Ala. 1989), cert. granted, ___ U.S. ___, 110 S. Ct. 1780 (1990)	2
<u>Papa v. City of New York</u> , Index No. 15695-86 (N.Y. Supreme Court, Kings Co., 1990)	7-8
<u>Sharapata v. Town of Islip</u> , 56 N.Y.2d 332, 452 N.Y.S.2d 347 (1982)	4
<u>Sniadach v. Family</u> <u>Finance Corp.</u> , 395 U.S. 337 (1969)	11
<u>Solem v. Helm</u> , 463 U.S. 277 (1983)	13-14
<u>Southwestern Telegraph</u> <u>& Telephone Co. v. Danaher</u> , 238 U.S. 482 (1915)	16
<u>Tulsa Professional Collection</u> <u>Services v. Pope</u> , 485 U.S. 478 (1988)	11
<u>Other Authorities:</u>	
New York Court of Claims Act §8	3-4
New York General Municipal Law §50-k	5-6
New York Pattern Jury Instruction 3:50	14-15
U.S. Const. Amend. VIII	13

U.S. Const. Amend. XIV passim

No. 89-1279
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PACIFIC MUTUAL LIFE INSURANCE
COMPANY,

Petitioner,

-against-

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF FOR AMICUS CURIAE,
THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The City of New York submits this brief in support of reversal of the order of the Supreme Court of Alabama, dated September 15, 1989. In that order, the Supreme Court affirmed judgments, upon jury verdict, of the Alabama Circuit Court,

Jefferson County, which awarded \$1,040,000 to plaintiff Cleopatra Haslip, \$12,400 to plaintiff Cynthia Craig, \$15,290 to plaintiff Alma Calhoun, and \$10,288 to plaintiff Eddie Hargrove. Of the award to Ms. Haslip, punitive damages apparently account for an amount in excess of \$800,000. The Supreme Court of Alabama rejected a challenge to the award of punitive damages based upon the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Pacific Mutual Life Insurance Co. v. Haslip, 553 So.2d 537 (Ala. 1989), cert. granted, ___ U.S. ___, 110 S. Ct. 1780 (1990).

This is the fourth case in recent years to bring before this Court the issue of whether the standardless discretion given to juries to fix the amount of an award of punitive damages violates the Due Process Clause of the Fourteenth Amendment. In Aetna Life Insurance Co. v. Lavoie, 475

U.S. 813 (1986), Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988), and Browning-Ferris Industries of Vermont v. Kelco Disposal, ___ U.S. ___, 109 S. Ct. 2909 (1989), this Court resolved the case without having to address this recurring constitutional issue. In those cases, various amici curiae informed the Court about the growth in recent years of the frequency and size of awards of punitive damages. Those amici were almost exclusively insurance companies and business concerns in the private sector.

The City of New York has felt the effects of increased punitive damage awards and of a growing burden of tort liability in general in recent years. In 1929, the New York State Legislature waived sovereign immunity for torts by the State and its political subdivisions. That waiver is now codified in section eight of the New York

Court of Claims Act. The City is not insured for torts and pays judgments from a budget allocation for that purpose. In fiscal 1988-89, the City paid approximately \$150 million in tort judgments. In fiscal 1989-90, the City will most likely pay in excess of \$170 million in tort judgments. Such payments strain the City's budget in a time of financial stringency.

Some of these payments from the City treasury are for punitive damages. The City suffers from such awards despite being immune from the direct assessment of punitive damages under both New York law and the federal civil rights statutes. Sharapata v. Town of Islip, 56 N.Y.2d 332, 452 N.Y.S.2d 347 (1982); City of Newport v. Fact Concerns, 453 U.S. 247 (1981).

This immunity does not shield the City from the weight of punitive damages. The City has frequently indemnified City

employees who have been assessed punitive damages in civil cases. This indemnification arises from section 50-k of the New York General Municipal Law. General Municipal Law §50-k(2) requires the Corporation Counsel, upon the commencement of an action against a City employee, to make an initial determination whether the act or omission at issue "occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred." Once the Corporation Counsel makes that determination in the employee's favor, the City provides for the defense of the employee in that civil action.

General Municipal Law §50-k(3) provides that the City indemnify its employees for any judgment arising from an action or omission

which "occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained." The statute further provides that the duty to indemnify does not arise "where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee."

The City has paid awards of punitive damages in cases where the Corporation Counsel believes that the employee acted properly within the scope of his or her employment. Once that determination is made, the City does not abandon the employee because the jury reaches a contrary conclusion, perhaps influenced by the vision of a deep pocket. The City indemnifies its well-intentioned employees

regardless of the jury verdict. Thus does the City feel the sting of escalating punitive damages.

This sting is not merely theoretical. In Ismail v. Cohen, 899 F.2d 183 (2d Cir. 1990), the Court of Appeals reinstated a jury verdict of \$800,000, including \$150,000 in punitive damages, against a police officer who the Corporation Counsel determined had acted within the scope of his duties. In Papa v. City of New York, Index No. 15695-86 (N.Y. Supreme Court, Kings Co., 1990) a jury returned a verdict against the City and five police officers in favor of two plaintiffs in a police brutality case for \$76,115,000, including \$46,000,000 in punitive damages against police officers who the Corporation Counsel determined had acted within the scope of their duties. The nisi prius court subsequently reduced the

awards and entered judgment for \$6,005,000, including \$2,500,000 in punitive damages.

Even apart from indemnification, the specter of punitive damages affects the City by affecting the attitude of its employees. The high profile of the City's perceived deep pocket may encourage punitive awards where not even compensatory damages are appropriate. The best judgment of conscientious City employees may understandably be chilled by the prospect of punitive damages. The skyrocketing levels of these awards make this delicate situation that much more chilling.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment imposes procedural norms with which each state must comply in framing its system for punitive damages in civil cases. One such norm is that a jury must be given workable standards to guide

its discretion in determining the amount of an award of punitive damages. Due process requires that the amount of punitive damages be proportionate to the conduct being punished.

ARGUMENT

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT JURIES BE GIVEN WORKABLE STANDARDS TO GUIDE THEIR DISCRETION IN AWARDING PUNITIVE DAMAGES IN CIVIL CASES. DUE PROCESS FURTHER REQUIRES THAT SUCH AWARDS BE PROPORTIONATE TO THE CONDUCT BEING PUNISHED.

The City will not make a full argument in this brief about the requirements of due process upon state laws regarding punitive damages. A complete exposition of the argument must be left to the briefs of the parties to this appeal. This brief presents only the broad contours of one aspect of that argument.

Several recent opinions of individual Justices have noted the apparent merit of

the argument that due process requires some principled limits on a jury's discretion as to the awarding of punitive damages. In Bankers Life and Casualty Co. v. Crenshaw, supra, 486 U.S. at 86-89, Justice O'Connor addressed the due process argument which the Court did not reach. Noting that juries in Mississippi had untrammelled discretion in setting the amount of punitive damages, Justice O'Connor stated that "[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." Id. at 1656.

In Browning-Ferris Industries of Vermont v. Kelco Disposal, supra, 109 S. Ct. at 2923-2924, Justice Brennan wrote a short concurrence in which he stated that "I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages

in civil cases brought by private parties." Justice Brennan brought attention to "a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." Id. at 2923. The issue of standards for juries as to punitive damages is now before this Court for resolution.

State procedures which authorize juries to award punitive damages are state action for purposes of the Due Process Clause of the Fourteenth Amendment. This Court has applied the requirements of due process to state statutes which govern litigation and property executions between private parties. See, e.g., Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); North Georgia Finishing v. Di-Chem, Inc., 419 U.S. 601 (1975); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

In awarding punitive damages, a jury serves the purposes of punishment and deterrence, classic functions of criminal law. Those functions are served only under the aegis of the state. In empowering a jury to punish civil litigants with punitive damages, a state engages in state action which must comply with the requirements of due process.

The essence of due process in civil litigation is fundamental fairness. Lassiter v. Department of Social Services, 452 U.S. 18, 24-25 (1981). That concern is heightened when juries engage in the classic criminal function of punishment without the safeguards mandated in criminal cases. Fundamental fairness is lacking when juries are told that they may award punitive damages in an amount that they see fit for purposes of punishment and deterrence. Without workable standards and limits, juries are free to assess huge awards of punitive

damages against litigants viewed as deep pockets. Fundamental fairness should forbid singling out unpopular or prosperous defendants as especial targets.

Due process requires that juries be given standards to guide their discretion. A maximum ratio of punitive damages to compensatory damages is an indispensable standard. Such a ratio is common in areas such as anti-trust law. Without such a standard, jury awards of punitive damages are almost inevitably arbitrary. Indeed, juries typically lack workable standards for deciding whether punitive damages should be assessed at all.

More generally, due process forbids punitive awards which are disproportionate to the conduct being punished. The concept of proportionality is inherent in the Eighth Amendment prohibition against excessive fines. See Solem v. Helm, 463 U.S. 277

(1983). The same requirement of proportionality should apply as a matter of due process to civil punishment administered by juries in the form of punitive damages. A maximum ratio of punitive damages to compensatory damages is the most logical measure of proportionality.

Jury instructions typically do not communicate any requirement of proportionality. New York Pattern Jury Instruction 3:50, concerning the tort of malicious prosecution, is representative of the guidance given to juries in cases involving a wide spectrum of torts. As to punitive damages, that instruction states:

There is no exact rule by which to determine the amount of punitive damages. The amount you fix as punitive damages need bear no particular ratio or relationship to the amount you award as compensatory damages. You may fix such amount as you find, in your sound judgment and discretion, based on all of the facts before you, will serve to punish the defendant and deter

others from the commission of like offense.

Such an instruction licenses juries to award huge sums of money in punitive damages when a defendant appears to be a deep pocket. Fundamental fairness requires a principled limit to jury discretion.

Most current judicial review of punitive damage awards is toothless. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974), this Court remarked that "[i]n most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive." This Court relied in part on the gentleness of such review to ban, under the First Amendment, punitive damages in defamation actions against publishers and broadcasters. Id. The New York Court of Appeals has stated that "the amount of exemplary damages awarded by a jury should not be reduced by a court unless it is so grossly excessive 'as

to show by its very exorbitancy that it was actuated by passion' [cites omitted]." Nardelli v. Stamberg, 44 N.Y.2d 500, 504, 406 N.Y.S. 2d 443, 445 (1978). Due process requires that standards be available to structure a jury verdict from its inception, not that litigants rely on weak court review of an arbitrary verdict.

This Court has overturned a civil penalty which it found to be "so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." Southwestern Telegraph & Telephone Co. v. Danaher, 238 U.S. 482 (1915). That phrase describes the present system for awarding punitive damages in this country. Due process requires standards and proportionality as indispensable elements of fundamental fairness in this realm.

CONCLUSION

THE DUE PROCESS CLAUSE OF
THE FOURTEENTH AMENDMENT
REQUIRES THAT JURIES BE
GIVEN WORKABLE STANDARDS
AND LIMITS IN AWARDING
PUNITIVE DAMAGES IN CIVIL
CASES. DUE PROCESS FURTHER
REQUIRES THAT SUCH AWARDS
BE PROPORTIONATE TO THE
CONDUCT BEING PUNISHED. THE
ORDER OF THE SUPREME COURT
OF ALABAMA SHOULD BE
REVERSED.

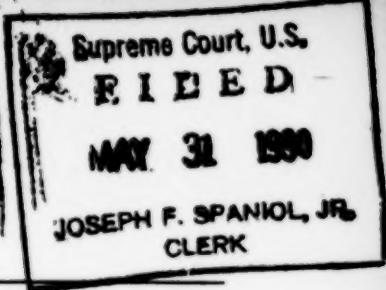
Respectfully submitted,

VICTOR A. KOVNER,
Corporation Counsel,
Attorney for Amicus Curiae,
the City of New York.

LEONARD J. KOERNER,*
PAMELA SEIDER DOLGOW,
JOHN HOGROGIAN,
of Counsel.

*Counsel of Record

(11)
No. 89-1279



IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA
M. CALHOUN and EDDIE HALGROVE,

Respondents.

On Petition for Writ of
Certiorari to the
Supreme Court of Alabama

BRIEF OF MID-AMERICA LEGAL FOUNDATION
AS AMICUS CURIAE SUPPORTING
THE POSITION PETITIONER

Martha A. Churchill
Counsel of Record
MID-AMERICA LEGAL FOUNDATION
20 North Wacker Drive, Suite 1721
Chicago, Illinois 60606
312/263-5163

BEST AVAILABLE COPY

No. 89-1279

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M.
CALHOUN and EDDIE HALGROVE,

Respondents.

TABLE OF CONTENTS

Page:

Table of Authorities	2
Interest of <u>Amicus Curiae</u>	3
Summary of Argument	6
Issue	8
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

J. T. Brown v. Louis Maxey, 124 Wis. 2d 426;
369 N.W. 2d 677 (1985)

Browning-Ferris Industries of Vermont v.
Kelco Disposal, Inc. 492 U.S. ___, 109 S. Ct.
2909 (1989)

Moore v. Jewel Tea Co., 46 Ill. 2d 288, 263
N.E. 2d 103 (1970)

Vaselenak v. Smith, 414 Mich. 567; 327 N.W.
2d 261 (1982)

Williams v. Cunningham Drug, 429 Mich 495;
418 N.W. 2d 381 (1988)

Statutes:

Ill. Rev. Stat. ch. 110, § 2-1207
Iowa Code Annotated, §668A.1
Minnesota Statutes Annotated, 549.20 and
555.15-18

Constitutional Authority:

14th Amendment to the U. S. Constitution.

Other Authorities:

Huber, Peter W., Liability, The Legal
Revolution and Its Consequences, (1990),
Basic Books, Inc., New York.

University of Miami Law and Economics
Center, (P.O. Box 248000, Coral Gables,
Fla., 33124), "Products Liability At A
Glance, 1990", published in Triodyne, Inc.
Safety Brief, March 1990, Volume 6, No. 1.
With permission.

**INTEREST OF MID-AMERICA
LEGAL FOUNDATION**

Mid-America Legal Foundation (MALF) is a non-profit Illinois corporation. MALF has an interest in the disposition of the case which is before this Court on writ of certiorari to review the judgment and opinion of the Alabama Supreme Court in Pacific Mutual v. Cleopatra Haslip, 553 So. 2d 537 (1989), based on the expertise and purpose of this organization.

MALF was organized in 1975 to engage in legal research, study and advocacy for the benefit of the general public. MALF takes special interest in issues of national scope that have a direct impact on the Midwest region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin.

The Midwest region is one of the most important manufacturing areas of the nation. The question of punitive damages has a great impact on our nation's producers in that

they frequently are subjected to punitive awards in products liability lawsuits. For example, it is possible for one alleged design defect in a product to bring multiple punitive awards, a result which has developed relatively recently with the evolving tort law of our times.

Punitive awards were once limited to cases in which an individual had conducted himself in such an egregious manner as to deserve special monetary damages being awarded against him. Today, punitive awards are being allowed more and more frequently against corporations, and as such there is no particular individual to be "punished" except the shareholders as a group, or their insurers.

MALF is able to give this Court a perspective from the point of view of the Midwestern states, comparing the law in those states with the situation at bar, and commenting on the economic impact this case

may have on the Midwestern region as a whole.

MALF is an advocate of the free enterprise system, and of individual rights as opposed to excessive government control. Punitive damages as applied in the instant case have a direct effect on the ability of American producers to compete on the world market as our courts are functioning in a totally unpredictable manner, akin to a lottery, in determining the amounts of tort awards for injured plaintiffs. Government, acting through the courts, is effectively crippling American industry.

Punitive damages as applied in Alabama and in other states are a serious problem, jeopardizing large corporations, as those are usually the principal target of those seeking large punitive damage awards. But in addition, punitive damages are hurting America's social welfare, in that American producers are placed at a disadvantage as

compared with foreign producers. The result is a loss of jobs and lifestyle in America.

MALF has obtained the consent of both parties to the filing of this brief, copies of the letters being on file with the Clerk of this Court or being sent to the Clerk by counsel for the parties.

SUMMARY OF ARGUMENT

This Court has never applied the 14th Amendment to the system by which punitive damages are applied in many states. Browning-Ferris Industries v. Kelco Disposal, Inc. 492 US __, 109 S. Ct. 2909 (1989).

Until relatively recently, punitive damages were awarded only in certain unusual cases involving individual turpitude or purposeful malicious behavior on the part of the defendant. However, in the last 20 years or so, punitive damages have been

applied on a far more widespread basis. The focus of such damages has shifted from individuals and has increasingly targeted corporations. In many cases, plaintiffs are permitted to argue that the size of the corporation is in itself a reason to grant a large punitive award.

The changing focus of punitive damages has resulted in a system which more resembles a lottery than a court of law. Instead of a legal system in which citizens can know in advance what to expect under the law, the system of punitive damages as it is applied today merely introduces a large element of chaos and uncertainty into the dispute resolution process. As a side effect of the court-imposed chaos, private insurance for liability becomes increasingly expensive as insurers cannot accurately predict risks for purposes of assessing premiums.

Rather than serving its original purpose of deterring unconscionable conduct,

the punitive damages system as applied today merely introduces a wildcard into the legal process, an arbitrary and unfair confiscation of property, clearly violative of the 14th Amendment to the Constitution.

ISSUE

Are punitive damages, as applied in this case, violative of the 14th Amendment Due Process Clause to the U.S. Constitution?

ARGUMENT

Though punitive damages have been around for generations, this area of the law has practically exploded in recent decades. Under old tort law, punitive damages were allowed only when the defendant had acted outrageously or with wanton disregard of the plaintiff's safety. Such awards were directed against individuals for their own

misconduct, not against the employers of wrongdoers or against corporations.

As a trend, plaintiffs are seeking punitive damages in more types of situations and against more defendants. The numbers of such cases and the amounts of the verdicts have skyrocketed in recent years.

As Peter W. Huber points out in his book, Liability, The Legal Revolution and Its Consequences, the explosive growth of punitive damage awards has completely altered the tort landscape.

"Demands for punitive damages were extremely rare until the 1960's; today they are routine when the injury is serious and a wealthy institution is numbered among the accused. ... Before 1970, for example, only about 0.5 percent of all tort claims filed against Ford Motor Company asked for punitive damages; by 1975 such demands had risen tenfold; and by 1980, punitive awards were being sought in more than a quarter of all cases."

Huber, supra, at page 127

The reason for the punitive damage explosion is obvious. It raises the stakes

in the tort system by introducing a totally open-ended factor-- a jury license to award, as in the case at bar, literally any amount of money out of thin air.

The totally arbitrary nature of punitive awards can be demonstrated by the results in products liability cases, where a manufacturer may be subjected to exemplary penalties multiple times for the same product.

"Out of eleven early cases against MER/29 [an anti-cholesterol drug], the manufacturer won four, the plaintiff won only compensatory damages in four, and the plaintiff won punitive damages in three-- one of which was then overturned on appeal."

Huber, supra, at page 110

Currently 29 of the 50 states specifically provide for punitive damages in one form or another, according to a study by the University of Miami Law and Economics Center. The results of that study were published in the Triodyne, Inc. Safety Brief, March, 1990, illustrating the crazy-quilt nature of tort law from one state to the next.

There is enormous variation as to punitive damages among the Midwestern states.

Ohio allows punitive damages, but the judge determines the amount to be paid.

In Wisconsin, the leading case involves a landowner who paid punitive damages to an injured tenant because of someone else's criminal act on his property. Brown v. Louis Maxey, 124 Wis. 2d 426; 369 N.W. 2d 677 (1985). The defendant, who owned a federally subsidized housing project, was ordered to pay punitive damages for a fire which was set deliberately by a relative of a tenant. The Brown court observed that the landlord's behavior, though not malicious or purposeful, was "outrageous" in that he should have taken steps to avoid the possibility of arson--such as "more thorough tenant selectivity." Brown, supra, 369 N.W. 2d at 683.

It is interesting that the Wisconsin court allowed punitive damages against this defendant for a fire he did not set. If the

defendant's conduct was criminal in some sense, presumably the fire marshal could have issued a citation or sought criminal prosecution; however the Wisconsin civil judges felt it within their province to provide the punishment, by adding punitive damages to the compensation this defendant was otherwise liable for.

The Brown case also stands for the principle that punitive awards are covered by insurance in Wisconsin. Not all states follow that practice, though, usually on policy grounds that punitive damage awards are to punish, and so insurance coverage for them would defeat the purpose. (1)

Contrast the Wisconsin situation with Michigan's, where landowners are not responsible for crimes by others in the first place. Williams v. Cunningham Drugs, 429 Mich. 495; 418 N.W. 2d 381 (1988). Nor are

(1) Compare: the U.S.S.R. prohibits liability insurance for negligence, on policy grounds. It is felt that personal responsibility for tort deters negligent behavior.

punitive damages allowed under Michigan common law, since plaintiffs are considered fully compensated by their recovery for non-economic damages. Vaselenak v. Smith, 414 Mich. 567; 327 N.W. 2d 261 (1982).

Iowa allows punitive damages, but the system is tightly controlled by statute. See Iowa Code Annotated, §668A.1. Iowa plaintiffs may receive only 25 percent of the punitive award unless it can be proven that the defendant directed his conduct specifically at the claimant. The remainder of the award is paid to a state fund for uninsured litigants, which has the salutary effect of preventing undeserved windfalls to plaintiffs. That provision may, however, put the statute in jeopardy of an 8th Amendment constitutional challenge pursuant to Browning v. Kelko, supra.

Illinois has a statutory provision allowing the judge to apportion punitive damages among the plaintiff, plaintiff's

counsel, and the Illinois Department of Rehabilitation Services. See Ill. Rev. Stat. ch. 110, § 2-1207. Though that provision may be violative of Browning, supra, it was part of a 1986 reform package which parallels Iowa's provision in that respect.

Illinois is somewhat liberal in awarding punitive damages, applying a standard which is not sharply distinguishable from that of negligence. The test is "willful and wanton conduct" which can be proven without showing any specific intent to injure. See Moore v. Jewel Tea Co., 46 Ill. 2d 288, 263 N.E. 2d 103 (1970).

The legislature in Minnesota recently grappled with the danger of allowing unbridled punitive awards, and took steps to cut back some of the more blatantly unfair aspects of the system. Compare Minnesota Statutes Annotated, 549.20, with § 555.15-18.

Minnesota law is interesting in that it

addresses certain abuses of the punitive damages system which are evident in the case at bar.

The newly revised statute, M.S.A 555.15 et. seq., permits a party bifurcation of the trial where the issue of punitive damages has been raised. Bifurcation eliminates the problem of inflammatory evidence being introduced during the trial in chief, such as the wealth of defendant, which may well influence the jury's assessment of the compensatory damages issue.

Minnesota has addressed the problem faced by subsequent plaintiffs when the first claimants, through use of punitive damages, have dried up the source of compensation for future litigants, as happened in the instance of Searle and its IUD litigation. A Minnesota defendant is permitted to introduce evidence at trial showing its liability to other plaintiffs, in an effort to reduce the punitive award. That provision is seldom

used by defendants, though, as its negative impact on the jury could well outweigh any benefit it might have to the defendant.

The fact that Minnesota has dealt with the problem legislatively is evidence that the Minnesota legislature has perceived the basic unfairness of unbridled punitive damages, and without analyzing it as a due process question has attempted to mitigate some of the more harmful aspects of the punitive damages system.

CONCLUSION

The procedure for application of punitive damages in Alabama, as shown in the case at bar, has clearly evolved into an oppressive and arbitrary system which effectively turns the courtroom into a gambling casino. This insurance company could not by any stretch of the imagination have intended the harm to plaintiffs, nor even had advance knowledge of the harm. The Alabama court

would nevertheless subject it to an award which bears no relation whatsoever to the "crime" of its employee. Rather, the jury was given the opportunity to vent its prejudice against big business and its frustration against insurance companies in general; all of which serves no legal, judicial, or social purpose.

This Court has the opportunity to rule, once and for all, that punitive damages as applied in this instance are in fact a violation of the 14th Amendment to the Constitution of the United States.

THE MID-AMERICA LEGAL FOUNDATION
Martha A. Churchill, General Counsel
20 North Wacker Drive, Suite 1721
Chicago, Illinois 60606
(312) 263-5163

Dated: June 1, 1990

**In The Supreme Court
OF THE
United States**

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, et al.,
Respondents.

**ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA**

**BRIEF AMICUS CURIAE FOR
THE HOSPITAL AUTHORITY OF GWINNETT
COUNTY, GEORGIA
IN SUPPORT OF THE PETITIONER**

* HAROLD N. HILL, JR.
E. CLAYTON SCOFIELD III
HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
Suite 1400
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Attorneys for the Amicus

* Counsel of Record

Of Counsel:

MEADE BURNS
MILTON B. SATCHER
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

QUESTIONS PRESENTED

Whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment impose limitations on a jury's standardless discretion to: (1) award punitive damages in civil cases, and (2) determine the amount of such punishment?*

* Pursuant to Rule 29.1 of the Rules of this Court, the following constitutes a list of all parent companies, non-wholly owned subsidiaries, and affiliates of Amicus: the Gwinnett Hospital System Foundation, Inc., and its subsidiary, Gwinnett Service Corporation, Inc.

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii
Interest of the Amicus	1
Summary of Argument	1
Argument	3
I. The Assessment of Punitive Damages Violates Due Process	3
II. The Assessment of Punitive Damages Denies Equal Protection	5
III. A Proposed Solution	11
Conclusion	19

TABLE OF AUTHORITIES

Cases	<u>Page</u>
<i>Bankers Life and Casualty Co. v. Crenshaw</i> , 486 U.S. 71, 87 (1988)	5,6,10
<i>Benton v. Maryland</i> , 395 U.S. 784 (1969) ..	4
<i>Browning-Ferris Industries of Vermont, Inc.</i> <i>v. Kelco Disposal, Inc.</i> , 109 S.Ct. 2909, 106 L.Ed. 2d 209 (1989)	5,10,12,13,16
<i>Burns v. Ohio</i> , 360 U.S. 252, 257-58 (1959)	9
<i>Chicago & N.W. Ry. Co. v. N.Y.E-Schneider-</i> <i>Fowler, Co.</i> , 260 U.S. 35, 44 (1922)	5
<i>Coley v. State</i> , 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)	9
<i>deHaas v. Empire Petroleum Co.</i> , 435 F.2d 1223 (10th Cir. 1970)	4,5
<i>Digital & Analog Design v. N. Supply Co.</i> , 540 N.E.2d 1358 (Ohio 1989)	4
<i>Eddings v. Oklahoma</i> , 455 U.S. 104, 111 (1982)	9
<i>Electrical Workers v. Foust</i> , 442 U.S. 42 (1979)	10,12
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972) ..	9
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	5,7,10,12
<i>Giaccio v. Pennsylvania</i> , 382 U.S. 399 (1966)	3
<i>Globus v. Law Research Service, Inc.</i> , 418 F.2d 1276 (2d Cir. 1969), 397 U.S. 913 (1969)	4
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980) ..	18
<i>Gregg v. Georgia</i> , 428 U.S. 153, 198 (1976)	8,9
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956)	9

	<u>Page</u>
<i>Hospital Authority of Gwinnett County,</i> <i>Georgia v. Jones</i> , No. 89-1315, now pending.....	1,3
<i>Juzwin v. Amtorg Trading Corp.</i> , 718 F.Supp. 1233 (D. N.J. 1989)	4
<i>Juzwin v. Asbesto Corp. Ltd.</i> , slip opinion filed Apr. 10, 1990 (3rd Cir. 1990)	4
<i>Lindsey v. Normet</i> , 405 U.S. 56, 76-77 (1972).....	7
<i>Mayer v. City of Chicago</i> , 404 U.S. 189, 196-197 (1971)	6,9
<i>McCleskey v. Kemp</i> , 481 U.S. 279, 302 (1987).....	9
<i>Missouri Pac. R. Co. v. Tucker</i> , 230 U.S. 340 (1913)	3
<i>Musser v. Utah</i> , 333 U.S. 95 (1948)	3,7
<i>Penn Central Transp. Co. v. New York City</i> , 438 U.S. 104 (1978)	3
<i>Roginsky v. Richardson-Merrell, Inc.</i> , 378 F.2d 832 (2d Cir. 1967)	4
<i>Rosenblum v. Metromedia, Inc.</i> , 403 U.S. 29 (1971).....	5
<i>Santosky v. Kramer</i> , 455 U.S. 745, 756 (1982).....	6
<i>Shamblin's Ready Mix, Inc. v. Eaton Corp.</i> , 873 F.2d 736 (4th Cir. 1989)	12
<i>Small Co. v. American Sugar Ref. Co.</i> , 267 U.S. 233 (1925)	3
<i>Smith v. Bennett</i> , 365 U.S. 708, 714 (1961)	9
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	5,10
<i>Southwestern Tel. & Tel. Co. v. Danaher</i> , 238 U.S. 482 (1915)	3
<i>Standard Oil Co. v. Missouri</i> , 224 U.S. 270 (1912).....	4
<i>Trop v. Dulles</i> , 356 U.S. 86, 94 (1958)	4

	<u>Page</u>
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979).....	4
<i>United States v. Evans</i> , 333 U.S. 483 (1948).....	4
<i>Village of Hoffman Estates v. Flip Side,</i> <i>Hoffman Estates, Inc.</i> , 455 U.S. 489, 498- 500 (1982)	6
<i>In Re: Winship</i> , 397 U.S. 358 (1970).....	4,7
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971).....	3
<i>Woodby v. Immigration and Naturalization</i> <i>Serv.</i> , 385 U.S. 276 (1966)	4

Federal Statutes

7 U.S.C. § 1346(a) (1982)	16
7 U.S.C. § 1380n (1970)	15
7 U.S.C. § 1642(d) (1982)	16
7 U.S.C. § 2564 (1982)	16
12 U.S.C. § 1723a(e) (1982)	16
12 U.S.C. § 1975 (1982)	15
15 U.S.C. § 15 (1982)	15
15 U.S.C. § 72 (1982)	16
15 U.S.C. § 1117 (1970)	16
15 U.S.C. § 1640(a) (2) (A) (1982)	16
15 U.S.C. § 1691e(b) (1982)	16
15 U.S.C. § 1692K(a) (1) (1982)	16
15 U.S.C. § 1692K(a) (2) (A) (1982)	16
15 U.S.C. § 1692K(a) (2) (B) (1982)	16
18 U.S.C. § 1964(c) (1970)	15
31 U.S.C. § 231 (1970)	16
35 U.S.C. § 284 (1970)	15
40 U.S.C. § 489(b) (1) (1982)	16
42 U.S.C. § 3612(c) (1982)	16
45 U.S.C. § 711(j) (1982)	16

State Statutes

Code of Alabama § 5-19-19 (1981)	7
Code of Alabama § 6-6-314 (1977)	7
Code of Alabama § 6-11-20 (1989)	17
Code of Alabama § 8-19-5(19), (20) (1984)	7
Code of Alabama § 8-19-10(a) (2) (1984)	7
Code of Alabama § 37-2-18 (1977)	7
Official Code of Georgia Annotated § 51-12-5 (1982)	2,18
Official Code of Georgia Annotated § 51-12-5.1 (1987)	17

Other Authorities

Restatement (Second) of Torts, § 908 (1979)	13
L. Schlueter and K. Redden, Punitive Damages (2d Ed. 1989)	<i>passim</i>

**BRIEF AMICUS CURIAE FOR
THE HOSPITAL AUTHORITY OF GWINNETT
COUNTY, GEORGIA
IN SUPPORT OF THE PETITIONER**

INTEREST OF THE AMICUS¹

The Amicus, the Hospital Authority of Gwinnett County, is the Petitioner for certiorari in *The Hospital Authority of Gwinnett County, Georgia v. Robert Stanford Jones, Administrator of the Estate of William Harold O'Kelley, Deceased*, No. 89-1315, now pending.

The issues to be reviewed in the instant case (No. 89-1279) are similar to and may decide issues raised by the Amicus in its case (No. 89-1315). Because Amicus may be bound by the Court's decision in this case as to some of the due process and equal protection issues Amicus has raised, it desires to be heard.²

SUMMARY OF ARGUMENT

In the absence of statutes specifying with particularity the conduct for which punitive damages may be awarded and limiting the amounts thereof by reference to an ascertainable standard, awards of punitive damages violate defendants' rights to due process and equal protection of the law by, *inter alia*, failing to provide advance notice of the conduct for which punitive damages may be awarded and failing to provide a rational basis upon

¹ Consent from counsel for both parties has been filed with the Clerk of this Court.

² In its case (No. 89-1315), Amicus has raised, *inter alia*, the issue of absence of notice of the offenses for which punitive damages may be authorized, a threshold issue which may not be reached in the instant case.

which the amounts of punitive damages are to be determined.³

The collective wisdom of most legislative bodies, both state and federal, when enacting punitive damages statutes, is that the particular conduct warranting awards of punitive damages should be specified and that limits should be imposed thereon, such limits most often being treble damages or "up to" treble damages. Moreover, the legislative trend is to require proof by "clear and convincing" evidence.

In the absence of such statutes, the notice and other rights guaranteed by the Constitution (*e.g.*, the prohibition on double jeopardy) can be protected by allowing punitive damages only when the defendant's act constituted a crime by the defendant against the plaintiff in the jurisdiction in which the act was committed.

Amicus therefore seeks a ruling by this Court that, in the absence of a statute (i) identifying the specific acts for which punitive damages may be allowed and (ii) providing a standard by which they are to be measured, an award of punitive damages to a private plaintiff in a civil suit violates the defendant's right to due process and equal protection of the law unless it is shown by clear and convincing evidence that the act constituted a crime by the defendant against the plaintiff in the jurisdiction in which it was committed. Amicus also seeks a ruling that, in the absence of such a statute, awards of punitive damages in excess of twice the amount of actual damages (that is, awards in excess of treble damages) are standardless and excessive and violate the defendant's right to due process and equal protection of the law.

³ Although Georgia has a statute authorizing punitive damages in tort cases, O.C.G.A. § 51-12-5, that statute does not specify with particularity the conduct for which punitive damages may be awarded, or limit the amounts thereof.

ARGUMENT

I. THE ASSESSMENT OF PUNITIVE DAMAGES VIOLATES DUE PROCESS.

As set forth in the Amicus' Petition for Writ of Certiorari in *The Hospital Authority of Gwinnett County, Georgia, v. R. Stanford Jones, supra*, No. 89-1315 (pp. 16-17), the standardless discretion of a jury to (1) award punitive damages in civil cases, and (2) determine the amount of such punishment, violates the Due Process Clause in each of the following ways:⁴

(a) Because people (later to become defendants) can become liable for punitive damages without notice of the nature of the offenses for which they may be held liable for such damages;⁵ and juries may assess punitive damages without guidance as to the nature of the offenses for which punitive damages may be awarded;⁶

⁴ Damages and penalties imposed by state laws, including civil laws, may be invalid as deprivations of property without due process of law. *Missouri Pac. R. Co. v. Tucker*, 230 U.S. 340, 351 (1913); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915). See also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). In addition, the fifth amendment right against the taking of private property for public use without just compensation has been incorporated into the Fourteenth Amendment and is therefore applicable to the states. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978). The fact that punitive damages are awarded to a civil litigant rather than to the state is of no significance to a defendant. Punitive damages, when properly allowed, serve a public purpose and hence the Fifth Amendment "public use" provision is satisfied. See *Southwestern Tel. & Tel. Co. v. Danaher, supra*.

⁵ *Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 238-239 (1925); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-404 (1966).

⁶ *Giaccio v. Pennsylvania, supra*; see also *Musser v. Utah*, 333 U.S. 95, 97 (1948).

(b) Because punitive damages are awarded upon proof by a mere preponderance of the evidence, despite the punitive and at least quasi-criminal nature of such damages;⁷

(c) Because unlimited punitive damages may be awarded against the same persons in separate suits, and such persons are thereby in jeopardy of repeatedly paying punitive damages for the same conduct or offense;⁸

(d) Because juries are not provided an objective standard for calculating or determining the amount of punitive damages to be awarded, whether by reference to actual damages, the defendant's ability to pay, or otherwise;⁹

(e) Because there is no ascertainable, definitive or meaningful limit upon the amount of punitive damages to be awarded;¹⁰ and

(f) Because punitive damages may be awarded without relationship to the public safety, health, or welfare sought

⁷ *In Re: Winship*, 397 U.S. 358, 365-366 (1970); *Trop v. Dulles*, 356 U.S. 86, 94 (1958) ("If the statute imposes a disability for the purpose of punishment — that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal") *see also* *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276, 284-286 (1966), and cases cited.

⁸ *Benton v. Maryland*, 395 U.S. 784, 794-796 (1969); *Juzwin v. Amtorg Trading Corp.*, 718 F.Supp. 1233 (D. N.J. 1989), *rev'd*, on other grounds, *Juzwin v. Asbestos Corp. Ltd.*, slip opinion filed Apr. 10, 1990 (3rd Cir. 1990); *Digital & Analog Design v. N. Supply Co.*, 540 N.E.2d 1358, 1366 (Ohio 1989); *see* *Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1285 (2d Cir. 1969), *cert den'd.*, 397 U.S. 913 (1969); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-842 (2d Cir. 1967); *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231 (10th Cir. 1970).

⁹ *See* *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *United States v. Evans*, 333 U.S. 483, 486 (1948).

¹⁰ *See* *United States v. Batchelder*, *supra*; *United States v. Evans*, *supra*; but *see* *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912).

to be served by the allowance of punitive damages, to wit: deterrence of intentional injuries; i.e., excessive punitive damages constitute "overkill" ("overdeterrence"), far beyond the states' police power requirements.¹¹

Leaving explication of these due process defects to *Pacific Mutual*, *Amicus* will not dwell on them. Instead, we will proceed to the equal protection problems inherent in punitive damages.

II. THE ASSESSMENT OF PUNITIVE DAMAGES DENIES EQUAL PROTECTION.

The aim of punitive damages, like the aim of the criminal law, is "to punish reprehensible conduct and to deter its future occurrence." *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988). Punitive damages are also akin to criminal fines, in that such damages are "private fines levied by civil juries . . ." *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. 323, 350 (1974).

There can be very little argument that the nature of punitive damages is penal, and this Court's cases abound with this recognition. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2932, 106 L.Ed. 2d 209 (1989). Punitive damages, in other words, " . . . serve the same function as criminal penalties . . ." *Rosenblum v. Metro Media, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) *overruled on other grounds*, *Gertz v. Robert Welch, Inc.*, *supra*. As the Chief Justice noted in his dissenting opinion in *Smith v. Wade*, 461 U.S. 30, 59 (1993) (Rehnquist, J., dissenting), punitive damages are "quasi-criminal" sanctions, but their imposition is "unaccompanied by the types of safeguards present in criminal proceedings." Thus, punitive damages partake of the elements that, in a purely criminal law context, would

¹¹ *Chicago & N.W. Ry. Co. v. NYE-Schneider-Fowler Co.*, 260 U.S. 35, 44 (1922); *see deHaas v. Empire Petroleum Co.*, *supra* n.8.

invoke the safeguards of other fundamental constitutional rights.

Distinctions drawn among the different classes (set forth below) subject to punitive damages ought to be afforded greater scrutiny than merely the "rational basis test." Punitive damages not only punish, they stigmatize. Cf., *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). In their essential nature, punitive damages touch upon interests that, in the criminal law context or if undertaken directly by the state, would be protected as fundamental. As with the case of quasi-criminal ordinances examined for compliance with vagueness standards, *Village of Hoffman Estates v. Flip Side, Hoffman Estates, Inc.*, 455 U.S. 489, 498-500 (1982), such discriminations in the application of punitive damages should also warrant a relatively strict test under the equal protection clause.

Even when tested under the Court's most deferential standard of review, the "rational basis test," the laws governing punitive damages are undisputedly subject to challenge if such laws result in arbitrary or irrational discrimination. *Bankers Life and Casualty Co. v. Crenshaw*, *supra*, 486 U.S. at 71. Amicus submits that the states have created arbitrary and capricious classifications under Alabama and other state laws (including Georgia) relating to the application and effect of punitive damages. Such classifications violate the equal protection clause.

Punitive damages are arbitrary and capricious, as compared to the rights of criminal defendants subject to fines, because they provide drastically fewer protections for private litigants in tort suits than the criminal law provides to persons accused of crimes and subject to fines.¹² Before criminal fines may be imposed, a defendant is ensured of advance notice of the nature of the offenses for

¹² A criminal defendant subject to a fine is entitled to the same constitutional protections as other criminal defendants. See *Mayer v. City of Chicago*, 404 U.S. 189, 196-197 (1971).

which he may be punished and the consequent certainty that judges and juries will be informed of the nature of the offenses for which such fines may be imposed. *Musser v. Utah*, *supra*, 333 U.S. at 97. Not so for defendants in civil cases liable for "private fines," as punitive damages have aptly been described. See *Gertz*, *supra*, 418 U.S. at 350.

Defendants in criminal cases subject to fines have the protection of a statutory limitation upon the amount of fine which may be imposed, and protection against double jeopardy. Moreover, persons charged with crimes may not be convicted unless they are found guilty beyond a reasonable doubt, an important and fundamental protection of the individual against punitive action, and a substantially higher burden of proof than a mere preponderance of the evidence. *In Re: Winship*, 397 U.S. 358, 364 (1970). Civil defendants subject to punitive damage awards are denied these, and other, fundamental protections afforded defendants subject to criminal fines. The denial of these safeguards permits "overkill" ("overdeterrence"), is not rationally related to a legitimate state interest (punishment or deterrence), and is, accordingly, offensive to the Constitution. See *Lindsey v. Normet*, 405 U.S. 56, 76-77 (1972).

The imposition of punitive damages is also arbitrary and capricious when compared to other civil defendants protected by special punitive damage statutes, as provided for in Alabama¹³ and other states.¹⁴ Allowing open-ended, unlimited punitive damages against some defend-

¹³ See Code of Alabama § 5-19-19 (1981) (double damages or ten times any excess interest charged); § 6-6-314 (1977) (double damages for unlawful detainer); § 8-19-10(a)(2) (1984) (treble damages for some deceptive trade practices); § 8-19-5(19), (20) (1984) (treble damages for other deceptive trade practices); § 37-2-18 (1977) (treble damages for excessive rates by common carriers).

¹⁴ Citations to such statutes under California law are contained in Appendix 7 to Petitioner's Reply Brief on Petition for Certiorari herein.

ants, while limiting the punitive damages possible for other conduct specified by statute, is arbitrary when considered in light of the complete lack of safeguards and standards for the protection of civil defendants not subject to a special statute.

Whereas civil defendants in Alabama or Georgia may be subjected to unlimited discretion in the awarding of punitive damages in tort cases generally, other civil defendants, charged with usury, unlawful detainer, deceptive trade practice, and excessive rate making, for example, are singled out for a limitation in their exposure. Where "moral discretion" (as in Alabama), or "the enlightened conscience of the jury" (as in Georgia), is the only limitation on the amount of punitive damages, there can be no rational basis for protecting some defendants guilty of certain specified classes of conduct, by limiting damages to specific amounts or percentages, or to double or treble damages, and leaving other civil defendants, such as Pacific Mutual and Amicus, unprotected. There is no rational way to reconcile these distinctions. Important and fundamental constitutional rights are involved which warrant protection.

This Court has protected against the risk of arbitrary and capricious action in the area of criminal punishment by requiring a jury's discretion to be suitably directed and limited. Although the death penalty is not comparable to punitive damages, as such, this Court's cases dealing with the death penalty demonstrate, by analogy, a step in the right direction for controlling the imposition of punitive damages. As should be required with punitive damages, in the death penalty cases, this Court has required that a jury's discretion be controlled by clear and objective standards to produce nondiscriminatory application of the law. See *Gregg v. Georgia*, 428 U.S. 153, 198 (1976).

In the death penalty cases, this Court has prescribed procedures for adequate information, guidelines, and standards under which discretion must be exercised by

the authority imposing the punishment. See *McCleskey v. Kemp*, 481 U.S. 279, 302 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982). Failure to so provide as to punitive damages produces arbitrary results discriminatory to those unprotected by due process safeguards and by statutory limits imposed by state law.¹⁵

By analogy, punitive damages threaten a financial death to both corporations and individuals. Such a threat warrants constitutional protection. Just as the sentence of death cannot be imposed without proper standards and direction, neither should punitive damages be allowed to be imposed without standards to assure fairness of treatment and equal protection of the laws. The treatment of the death penalty suggests a proper framework for securing the goals of consistent application and fairness in the imposition of punitive damages. See *Eddings v. Oklahoma*, *supra*, 455 U.S. at 875.

In addition, this Court has recognized that criminal defendants are entitled to fundamental fairness and equality throughout the criminal justice system. *Griffin v. Illinois*, 351 U.S. 12, 18-21 (1956); *Mayer v. City of Chicago*, *supra*, 404 U.S. at 197-98; *Burns v. Ohio*, 360 U.S. 252, 257-58 (1959); *Smith v. Bennett*, 365 U.S. 708, 714 (1961). In all of these cases, this Court recognized the

¹⁵ Although the death penalty cases were decided under the Eighth Amendment, concepts of fairness, due process, and equal protection were not disregarded in the analysis. See *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982) ("Beginning with [*Furman v. Georgia*, 408 U.S. 238 (1972)], the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused."); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *McCleskey v. Kemp*, 481 U.S. 279, 302 (1987) (quoting *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)) (Death penalty statute is constitutional as long as procedures ensure that any jury discretion "is controlled by clear and objective standards so as to produce non-discriminatory application.").

invidious, arbitrary, and capricious discrimination against indigent criminal defendants as violative of the equal protection clause. The essence of the violation was a denial of fundamental fairness in the proceedings, as is the case with punitive damages.

In Alabama, and Georgia as well, where the damages awardable are discretionary, where damages are not required to be proportional, where there is no limitation upon the amounts that may be awarded, such open-ended liability is arbitrary and capricious and bears no rational relationship to any appropriate state interest. This result obtains whether the treatment of punitive damages defendants in civil cases is compared to criminal defendants subject to fines, or to civil defendants subject to limited punitive statutes under other specific enactments. Whereas punitive damages defendants may, without notice, have open-ended "civil fines" imposed based upon a preponderance of the evidence, criminal defendants' crimes are defined and the fines are limited and may only be imposed upon satisfaction of a higher burden of proof.

This Court has recognized the arbitrary and capricious nature of punitive damage awards. *See Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 350 ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused"); *Electrical Workers v. Foust*, 442 U.S. 42, 51, n.14 (1979) (quoting *Gertz, supra*); *Bankers Life and Casualty Co. v. Crenshaw, supra*, 486 U.S. at 87 (the "impact of these windfall recoveries is not predictable and potentially substantial") (O'Connor, J., concurring); *Browning-Ferris Industries v. Kelco Disposal, Inc., supra*, 109 S.Ct. at 2932 ("A governmental entity can abuse its powers by allowing civil juries to impose ruinous damages as a way of furthering . . . the criminal law.") (O'Connor, J., concurring); *Smith v. Wade, supra*, 461 U.S. at 59 ("punitive damages are frequently based upon the caprice and prejudice of ju-

rors") (Rehnquist, J., dissenting). It is the arbitrary and capricious nature of these damages when compared to defendants singled out for particular legislation, both criminal and civil, that renders punitive damages unconstitutional under the Equal Protection Clause.

Accordingly, the fines imposed as punitive damages in civil cases under Alabama and Georgia law deprive civil defendants of equal protection of the law by denying such defendants the protections, direction, and limitations afforded to other civil defendants and criminal defendants subject to fines. The laws in issue should also be declared unconstitutional as a violation of equal protection.

III. A PROPOSED SOLUTION.

In this section Amicus will undertake to set forth the current status of the laws relating to punitive damages and, based thereon, to recommend a solution which satisfies the requirements of both the Due Process and Equal Protection Clauses of the Constitution.

According to a recent survey of state law, L. Schlueter and K. Redden, 2 *Punitive Damages* (2d Ed. 1989) (pp. 168-270), punitive damages are allowed in 48 states. They are generally disallowed in the other two states, Nebraska (*Id.* 228), and New Hampshire (*Id.* 230).¹⁶

Although there is some variance in the words used in the 48 states allowing punitive damages, the almost universal purpose of punitive damages as expressed by the courts, and in some instances by the state legislatures, is to punish the defendant and to deter the defendant and

¹⁶ The Nebraska court has held that statutes authorizing punitive damages are prohibited by the state constitution's due process clause (*Id.* 228). However, Schlueter and Redden list four Nebraska statutes authorizing double or treble damages (*Id.* 228-229).

others from similar misconduct.¹⁷ As this Court noted in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, *supra*, 109 S.Ct. at 2920: "... punitive damages advance the interest of punishment and deterrence, which are also among the interests advanced by the criminal law"

Based upon their study, Schlueter and Redden reached the following conclusion:

... [I]t has been a well-settled doctrine in this country for over a century that punitive damages are non-compensatory in character. The availability of actual damages in tort for mental anguish, wounded feelings, indignity and embarrassment have made the awarding of punitive damages on such basis redundant. In fact, the decisional law of only three states has assigned to punitive damages a compensatory function. (Footnotes omitted.)

1 L. Schlueter and K. Redden, *Punitive Damages* (2d Ed. 1989) p. 17.

This Court has recognized that "[p]unitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Electrical Workers v. Foust*, *supra*, 442 U.S. at 48, quoting *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 350. Citing *Gertz*, the Fourth Circuit Court of Appeals has found: "Thus, the compensatory function of punitive damages has become vestigial." *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 742 (4th Cir. 1989). Therefore, the purpose of punitive damages today almost invariably is to punish a person for

¹⁷ Punitive damages are sometimes called "exemplary damages" because their purpose is to punish the defendant and make an example of him, so as to deter others from similar misconduct.

outrageous conduct, and deter him and others from similar conduct in the future, Restatement (Second) of Torts § 908(1) (1979), and thereby to promote public safety.

That punitive damages have as their purpose promoting public safety by punishing the defendant and deterring him and others, gives rise to the correlative propositions that the conduct which gives rise to punitive damages should be recognizable in advance and that the amount of punitive damages should be adequate to serve the public purpose, but should not be excessive and hence constitute an "overdeterrence." For example, some businesses fearing excessive punitive damage awards are reputed to have adopted policies prohibiting their employees from causing shoplifters to be arrested, and passing those losses onto their paying customers. As Justice O'Connor has noted: "Some manufacturers of prescription drugs ... have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market." O'Connor, J., concurring in part in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, *supra*, 109 S.Ct. at 2924.

The fear, by itself, of excessive punitive damage awards should not be allowed to "overdeter" the arrest of shoplifters and the production of new and beneficial medicines. As observed by Schlueter and Redden, in recent years courts and legislatures have become concerned about punitive damages and have, *inter alia*, taken the position that "... punitive damages should not be imposed if such an award would impede, rather than promote, the public good ..." 1 L. Schlueter and K. Redden, *Punitive Damages*, 23.

How have the legislatures treated punitive damages? According to Schlueter and Redden, *supra*, Vol. 2 at 204, Massachusetts does not allow punitive damage awards absent statutory authority. Therefore, it is interesting to note that in Massachusetts, where its legislature has

enacted numerous statutes authorizing punitive damages to deter particularized conduct, in only five statutes listed by Schlueter and Redden did the Massachusetts legislature fail to limit punitive damages awards to either double or treble the actual damages (*Id.* 204-208).¹⁸

In the State of Washington, its Supreme Court has held that, in the absence of statutory authorization, punitive damages are not authorized on public policy grounds because the doctrine is "unsound in principle, unfair, and dangerous in practice" (*Id.* 266). In enacting punitive damages statutes the Washington legislature, has, with only one exception, provided limits on the amount of such awards and, again with only one exception, has limited punitive damages to double or treble damages (*Id.* 266-267).

Similarly, the general rule in Louisiana is that punitive damages will not be allowed unless expressly authorized by statute (*Id.* 199-200), and statutes enacted by the Louisiana legislature authorizing punitive damages for specified misconduct almost invariably contain a dollar or percentage limit, or provide for treble damages (*Id.* 200-201).

The California legislature also has been active in enacting statutes authorizing punitive damages for specified misconduct, and in a majority of that legislation punitive damages are limited to double or treble damages (*Id.* 173-178).

In fact, according to the statutes listed by Schlueter and Redden (*Id.* 168-270), when state legislators consider the subject of punitive damages they more often

¹⁸ "Treble damages" consist of two elements: First, actual damages, and, second, punitive damages in twice the amount of actual damages. "Double damages" provide for recovery of punitive damages in an amount equal to actual damages.

than not limit such awards to double or treble damages, or "up to" double or treble damages.

In eight states, Connecticut (*Id.* 180 — 181), Delaware (*Id.* 182-183), Illinois (*Id.* 190-193), Missouri (*Id.* 220-223), New Hampshire (*Id.* 230-231), Pennsylvania (*Id.* 248-249), South Carolina (*Id.* 252-255), and Texas (*Id.* 259-262), their legislatures have allowed, in a few statutes, more than treble damages, the most common multiplier in those eight states (other than double or treble) being "5 times," or "up to 5 times," actual damages.¹⁹

The reference to the foregoing eight states, which have some statutes which allow more than treble damages, should not overshadow the fact that the forty-seven state legislatures which have enacted punitive damages laws most often limit them to double or treble damages, or "up to" those amounts.²⁰ 2 L. Schlueter and K. Redden, *Punitive Damages*, pp. 168-270.

Like the states, when expressly providing for the allowance of punitive damages, Congress has provided for treble damages, or "up to" treble damages, in some statutes,²¹ has provided for double damages in some

¹⁹ The only state which has a statute which allows more than "5 times" apparently is Illinois, which allows the administrator of its toxic substances act to award punitive damages not to exceed ten times the total monetary amount owed by violators of the act, or \$20,000, whichever is larger (*Id.* 191).

²⁰ Of the three remaining states, as mentioned above Delaware has a "5 times" law (*Id.* 182), New Mexico has no punitive damages statutes (*Id.* 234), and Wyoming has only one punitive damages statute (*Id.* 270).

²¹ Agricultural Adjustment Acts, 7 U.S.C. § 1380n (1970); the anti-trust laws, Clayton Act of 1914, § 4, 15 U.S.C. § 15 (1982); Bank Holding Company Act, 12 U.S.C. § 1975 (1982); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(e) (1970); Patent Infringement, 35 U.S.C. § 284 (1970); Plant Variety

statutes,²² and has provided specific limits in other statutes.²³

Thus, when enacting punitive damages statutes, the collective wisdom of most legislative bodies is that punitive damages may be appropriate for specified misconduct but that limits should be placed thereon and we submit that, at least in the absence of a statute, those limits should be no more than "up to" treble damages.²⁴ Let the juries remain free to determine the amount of punitive damages for particularized misconduct, but within specified limits.

According to Schlueter and Redden, Punitive Damages, *supra*, in addition to limiting punitive damages, some states now require a higher burden of proof than the preponderance of the evidence: Arizona (clear and convincing, 1986, *Id.* 170); Colorado (beyond a reasonable doubt, 1973, *Id.* 179); Minnesota (clear and convincing, 1988, *Id.* 212); North Dakota (clear and convincing, 1987, *Id.* 239); Ohio (clear and convincing, 1987, *Id.* 241);

Act, 7 U.S.C. 2564 (1982); Prevention of Unfair Methods of Competition in Import Trade, 15 U.S.C. § 72 (1982); and Trademark Infringement, 15 U.S.C. § 1117 (1970).

²² Agricultural Adjustment Acts, 7 U.S.C. § 1642(d) (1982); False Claims Against the Government, 31 U.S.C. § 231 (1970); Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 489(b)(1) (1982); and Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(A) (1982).

²³ Agricultural Adjustment Acts, e.g. 7 U.S.C. § 1346(a) (1982); Consumer Credit Protection Act, 15 U.S.C. §§ 1692K(a)(1), 1692K(a)(2)(A), 1692K(a)(2)(B) (1982); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b) (1982); Fair Housing Act (Civil Rights Act of 1968), 42 U.S.C. § 3612(e) (1982); Federal National Mortgage Association Charter Act, 12 U.S.C. § 1723a(e) (1982); and Rail Reorganization Act, 45 U.S.C. § 711(j) (1982).

²⁴ "Awards of double or treble damages authorized by statute date back to the 13th century . . ." *Browning-Ferris Industries v. Kelen Disposal, Inc.*, *supra*, 109 S.Ct. at 2919.

Oklahoma (clear and convincing, 1987, *Id.* 243); and Oregon (clear and convincing, 1987, *Id.* 246). To this list, at least Alabama and Georgia now can be added. Code of Alabama § 6-11-20 (1989) (clear and convincing); Official Code of Georgia Annotated § 51-12-5.1 (1987) (clear and convincing; effective for causes of action arising after June 30, 1987).

In view of the foregoing, we respectfully submit that in the absence of a statute providing notice of, and identifying for judges and juries, the specific acts for which punitive damages may be allowed, due process and equal protection prohibit punitive damages unless the defendant's act was shown by clear and convincing evidence to have been an act which constituted a crime by the defendant against the plaintiff in the jurisdiction in which it was committed. By tying punitive damages to criminal acts by the defendant against the plaintiff, the lack of notice, absence of standards to guide judges and juries, and the multiple jeopardy problems are solved. In fact, the criminal law may be the only solution to the requirement of notice. Moreover, if the defendant's act does not constitute a crime, then the jury should not be allowed, in its sole discretion, to take punitive action on an *ad hoc* basis.²⁵

We also respectfully submit that, in the absence of a statute providing a means for determining the amount of punitive damages, due process and equal protection prohibit punitive damages in excess of treble damages, by far the most common multiplier used by Congress and most state legislatures enacting punitive damages laws. The allowance of punitive damages, not to exceed twice the plaintiff's actual damages, would provide limitations on the amount of punitive damages based upon the severity

²⁵ Unless prohibited by statute, a liability insurance company could, if it saw fit to do so, include in its policies an exclusion for crimes, and thus the burden of punitive damages would fall not on the insurance company, to be passed on to its policyholders, but upon the criminal actor individually.

of the injury or damage caused by the defendant, and would protect the states' interests in public safety, health and welfare without "overdeterrence" beyond the states' police power requirements. In those cases in which the act was shown by clear and convincing evidence to be a crime by the defendant against the plaintiff, the jury could ascertain the actual damages and award a separate amount as punitive damages, in a total amount not to exceed treble damages.²⁶

We respectfully submit that, in the absence of a specific statute, a holding such as that described above would solve most, if not all, of the due process and equal protection issues raised in this case.

The judgment and decision of the court below should be reversed for failing to so hold. (Similarly, the decision of the Supreme Court of Georgia in No. 89-1315 should be reversed because, although Georgia has a punitive damages statute, O.C.G.A. § 51-12-5, it fails to specify the conduct authorizing punitive damages with sufficient particularity to satisfy the requirements of due process and equal protection. That "entire want of care which would raise the presumption of a conscious indifference to the consequences" is too vague. There is nothing in these few words that implies any inherent restraint on the arbitrary and capricious infliction of punitive damages. *Cf., Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

²⁶ If a legislature in adopting a statute saw fit to allow treble or even higher damages for expressly described acts which do, or do not, constitute crimes, each of those expressly described acts could be evaluated by the state courts to determine whether the legislature was justified in allowing punitive damages for such specified acts, and allowing damages in amounts greater than authorized by the requirements of due process and equal protection applicable to punitive damages generally.

CONCLUSION

For the reasons set forth above the decision of the court below should be reversed for failure to afford litigants due process and equal protection.

June 1, 1990

Respectfully submitted,

*By: /s/ HAROLD N. HILL, JR.
HAROLD N. HILL, JR.

By: /s/ E. CLAYTON SCOFIELD III
E. CLAYTON SCOFIELD III

Attorneys for the Amicus

* Counsel of Record

HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
Suite 1400
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Of Counsel:

MEADE BURNS,
MILTON B. SATCHER
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

(13)
No. 89-1279

Supreme Court, U.S.

FILED

JUN 1 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

CLEOPATRA HASLIP, ET AL.,

Respondents.

On Writ of Certiorari
to the Supreme Court of Alabama

BRIEF OF AMICI CURIAE LIABILITY INSURANCE
UNDERWRITERS IN SUPPORT OF PETITIONER

Donald V. Jernberg
**OPPENHEIMER WOLFF
& DONNELLY**
Two Illinois Center
233 N. Michigan Avenue
Chicago, Illinois 60601
Telephone: (312) 819-4670

Thomas P. Kane
(*Counsel of Record*)
Ross F. Plaetzer
**OPPENHEIMER WOLFF
& DONNELLY**
1700 First Bank Building
St. Paul, Minnesota 55101
Telephone: (612) 223-2500

Counsel for Amici Curiae

June 1, 1990

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Amici will address the following questions, the first of which corresponds to Question 2, and the second to Question 1, in the petition for a writ of certiorari:

1. Does imposition of a punitive damage award violate the Fourteenth Amendment's due process requirement where the award is based on a vicarious or relational theory of liability and where the award is not rationally related to a legitimate punitive or deterrent function?
2. Does imposition of a punitive damage award violate the Fourteenth Amendment's due process requirement where the award is imposed absent a showing of a minimum degree of control or a minimal consciousness of the act for which punishment is to be imposed and where the award is not rationally related to a legitimate punitive or deterrent function?

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. PUNITIVE DAMAGE AWARDS IMPLICATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT	3
II. THE PUNITIVE DAMAGES AWARDED AGAINST PETITIONER UNDER A VICARIOUS OR RELATIONAL THEORY OF LIABILITY VIOLATE DUE PROCESS BECAUSE THEY ARE NOT RATIONALLY RELATED TO THE GOALS OF PUNISHMENT OR DETERRENCE	4
III. THE DUE PROCESS CLAUSE REQUIRES EVIDENCE OF A THRESHOLD MISCONDUCT BEFORE PUNITIVE DAMAGES MAY BE IMPOSED ON A DEFENDANT	7
(a) Aims Of Punitive Damages	8
(b) Punishment Goal	9
(c) Deterrence Goal	10
(d) Threshold Mental-State Requirement	12

CONCLUSION	15
APPENDIX	16

TABLE OF AUTHORITIES

CASES:

<i>Baltimore & Ohio R. Co. v. Goodman</i> , 275 U.S. 66 (1927)	11
<i>Bearden v. Georgia</i> , 461 U.S. 660 (1983)	4
<i>Bielski v. Schulze</i> , 16 Wis. 2d 1, 114 N.W.2d 105 (1962)	13
<i>Browning-Ferris Industries of Vermont, Inc.</i> <i>v. Kelco Disposal, Inc.</i> , 492 U.S. ____ (1989)	5, 7
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	5
<i>Davidson v. Cannon</i> , 474 U.S. 344 (1986)	4
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938)	5
<i>Haslip v. Pacific Mutual Life Ins. Co.</i> (R.T. 897-98)	5
<i>Lake Shore & Michigan Southern R. Co. v.</i> <i>Prentice</i> , 147 U.S. 101 (1893)	5, 6
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	4
<i>Milwaukee & St. Paul R. Co. v. Arms</i> , 91 U.S. 489 (1876)	13
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977)	6
<i>Morissette v. United States</i> , 342 U.S. 246 (1952)	9

<i>Poe v. Ullman</i> , 367 U.S. 497 (1961)	4
<i>Powell v. Texas</i> , 392 U.S. 514 (1968)	10
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986 (1984)	4
<i>Schall v. Martin</i> , 467 U.S. 253 (1984)	4
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	8, 9, 12
<i>Tinker v. Colwell</i> , 139 U.S. 473 (1902)	12
<i>Western Union Telegraph Co. v. Eyser</i> , 91 U.S. 495 (1876)	13, 14
<i>Wise v. Daniel</i> , 221 Mich. 229, 190 N.W. 746 (1922)	10
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982)	4
STATUTES:	
11 U.S.C. §523(a)(6) (1988)	12
Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549	12
MISCELLANEOUS:	
Calabresi and Klevorick, Four Tests For Liability In Torts, 14 J. Legal Studies 585 (1985)	11
Morris, Enterprise Liability and the Actuarial Process -- The Insignificance of Foresight, 70 Yale L.J. 554 (1961)	4
W.P. Keeton, Prosser and Keeton on Law of Torts § 34 at 214 (5th ed. 1984)	13

No. 89-1279

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

CLEOPATRA HASLIP, ET AL.,

Respondents.

On Writ of Certiorari
to the Supreme Court of Alabama

**BRIEF OF AMICI CURIAE LIABILITY INSURANCE
UNDERWRITERS IN SUPPORT OF PETITIONER**

INTEREST OF AMICI CURIAE¹

Amici curiae are insurance companies that write various lines of casualty and liability insurance, including

-
1. The consents of Petitioner and Respondents for the filing of this brief are on file with the Clerk of the Court.

comprehensive general liability ("CGL") insurance.² In 1989, amici wrote several billion dollars of CGL coverage in the United States. Their insureds range from small entrepreneurial, start-up manufacturers of innovative technology to long-established multinational corporations. What unites amici is their common and vital interest in the maintenance of a healthy insurance and risk-financing system in this country.

In the past, it has been possible for underwriters to assess the overall risks encountered by their insureds and, concomitantly, establish policy premiums and deductibles, with some degree of accuracy. Now all this has changed. Predictability, long the cornerstone of the American common-law system, and essential to effective risk management, is rapidly evaporating amid what has been characterized as the "Insurance Availability/Affordability Crisis."³ One of the many causes contributing to this crisis was the increase in the number and amount of punitive damage awards. Many States, of course, preclude an insured's receiving indemnification for punitive awards on public policy grounds. A few States, on the other hand, do not allow an insurer to exclude coverage for punitive damages. The growing threat of these awards has now become a major source of uncertainty in lawsuits involving underlying claims that are within the scope of existing policies. Not only does the presence of punitive damage claims increase the costs of defense under such policies, but

2. Amici curiae are, in alphabetical order: Great American Insurance Companies; Hawkeye-Security Insurance Company; Interstate Fire & Casualty Company; Mutual Service Casualty Insurance Company; and United Security Insurance Companies.

3. *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*. The Report is dated February, 1986 and was made public in March, 1986.

punitive damages also make settlements more difficult or impossible.

There are two principal obstacles. One is the potential liability of an employer for a punitive damage award made against the employer's employee or agent in situations where the employer has no possible means of detecting or preventing the employee or agent's misconduct and in no way ratifies, encourages, or blindly neglects the misconduct. A second obstacle is the lack of a clear standard in many states that delineates the types of misconduct that may make a person subject to punitive damages. The arguments in this brief demonstrate why punitive damages should not be allowed under the Due Process Clause of the Fourteenth Amendment against an employer based *solely* on a *respondeat superior* theory and also why there must be evidence of a delineated threshold of misconduct before a jury may impose a punitive award.

SUMMARY OF ARGUMENT

Punitive damages serve only two narrow legitimate purposes -- punishment and deterrence. Yet, where punitive damages are assessed under a vicarious or relational theory of liability or where punitive damages are imposed absent a showing of a minimum degree of control or a minimal consciousness of the act for which punishment is to be imposed, the assessment serves neither a punitive nor deterrent function. Accordingly, the assessment of punitive damages in such a case is an irrational exercise of state power and violates the substantive component of the Fourteenth Amendment's due process guarantee.

ARGUMENT

I. Punitive Damage Awards Implicate The Due Process Clause Of The Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any

person of . . . property, without due process of law." Petitioner invokes the substantive component of the clause. The substantive component of the Fourteenth Amendment's due process guarantee is intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). Amici and petitioner have a property interest that is protected by the Fourteenth Amendment and that is violated by both the threat and the actual imposition of punitive damages in civil actions where the only basis of liability is a vicarious one or where the alleged misconduct is not willful or conscious. Cf. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

Substantive due process always has required, at a minimum, that a court scrutinize State action to insure that it has a rational basis and a legitimate objective. In determining whether a substantive right protected by the Due Process Clause has been violated, "it is necessary to balance 'the . . . [property interest] of the individual' and 'the demands of an organized society.'" *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). In seeking this balance, the Court has "weighed the individual's interest in [property] against the State's asserted reasons for . . . [depriving the individual of property]." *Youngberg v. Romeo*, 457 U.S. at 320. Ultimately, the inquiry is whether the State action was fundamentally fair, or, instead, was arbitrary and irrational. *Schall v. Martin*, 467 U.S. 253, 263 (1984); *Bearden v. Georgia*, 461 U.S. 660, 674 (1983).

II. The Punitive Damages Awarded Against Petitioner Under A Vicarious or Relational Theory Of Liability Violate Due Process Because They Are Not Rationally Related To The Goals Of Punishment Or Deterrence.

In awarding an injured party compensatory damages, the law allocates losses and spreads risks to those most able to prevent an occurrence or to bear the loss. See Morris, Enterprise Liability and the Actuarial Process -- The

Insignificance of Foresight, 70 Yale L.J. 554 (1961). In stark contrast, this Court has noted that punitive damages serve only two narrow legitimate purposes. First, they punish the defendant. See, e.g., *Haslip v. Pacific Mutual Life Ins. Co.* (R.T. 897-98) (jury instructed in this case that it could award punitive damages "to punish the defendant"); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. _____, _____ (1989) (O'Connor, J., concurring in part and dissenting in part). Second, punitive damages serve to deter certain wrongful conduct. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (a major objective of punitive damages is deterrence).

Yet, where punitive damages are assessed under a vicarious or relational theory of liability, the award serves neither the punitive nor deterrent purpose and, therefore, may not be imposed consistent with due process requirements. This case presents an excellent example of the irrationality of a such a punitive award. The record below is clear that petitioner did not authorize, ratify or encourage Mr. Ruffin's acts in any manner nor did it profit from those acts. In addition, Mr. Ruffin was not authorized to act on behalf of petitioner in any managerial capacity. There was neither a jury instruction nor a determination by the State courts that petitioner *itself* had any culpability. The State courts, on the contrary, held that the imposition of punitive damages was permissible on the basis of *respondeat superior* alone.

Given these facts, the punitive award against petitioner can serve no rational purpose. Specifically, the award does not punish the wrongdoer because the record is clear that only Mr. Ruffin, and not petitioner, engaged in any misconduct. In *Lake Shore & Michigan Southern R. Co. v. Prentice*, 147 U.S. 101 (1893), this Court drew a distinction, as a matter of "general jurisprudence,"⁴ between the direct liability of a corporation for policies, practices, or conduct

4. *Lake Shore & Michigan Southern R. Co.* is a diversity case that was decided before *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

of its officers and directors, and the conduct of its employees for which it might be found vicariously liable. See 147 U.S. at 117. By this distinction, the Court held that punitive damages may be assessed against the corporation based on the acts of the former but may not be assessed because of the acts of the latter, absent some showing that the corporation participated in, approved or ratified the wrongful conduct. See 147 U.S. at 117.

Although decided as a matter of general jurisprudence, the reasoning underlying *Lake Shore & Michigan Southern R. Co.* is clear and applies equally to a due process analysis. That is, one should not be punished for the misconduct of another when one engages in no culpable act and is in no better position than is the public at large to take precautions against certain misconduct. Indeed, punishment (as opposed to compensatory loss allocation) by reason of mere association is contrary to "the basic values that underlie our society." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). Accordingly, due process must prevent a State from awarding punitive damages that are based solely on a party's relation to a wrongdoer.

Amici liability insurers are uniquely situated in this respect and are concerned that this Court uphold the principle that punitive awards may not be based solely on a party's relation to a wrongdoer. First, like other insurers, amici employ field "agents" to solicit applications for coverage and to forward on such applications. This practical and long-standing method of operation allows amici to serve efficiently a large segment of the population and to provide liability insurance at affordable premiums. It is practically impossible, however, for amici to detect or prevent the sort of flagrant misconduct in which Mr. Ruffin, the agent, engaged in this case.

Second, and more importantly here, as *liability* insurers amici enter into contracts indemnifying named insureds for liability that those named insureds may become obligated to pay to others. In entering into such contracts and in setting corresponding premium rates, amici attempt to assess the risk presented by the named insured. Such risk

becomes extremely difficult to assess, however, where punitive damages may be assessed against a named insured based solely on that insured's *relation to another person or entity* rather than as a result of the named insured's *own* acts or omissions. Moreover, even the threat of punitive damages' being assessed against a named insured based solely on the insured's relationship to a nearly limitless and fluid pool of potential wrongdoers is sufficient to have a substantial negative impact on the business interests of amici and on the national risk-financing system in general. Accordingly, amici respectfully request this Court to hold that the Due Process Clause prohibits an award of punitive damages against a party where the award is based solely on that party's relation to a wrongdoer.

III. The Due Process Clause Requires Evidence Of A Threshold Misconduct Before Punitive Damages May Be Imposed On A Defendant.

Fundamental fairness demands that there be evidence of a minimum threshold of misconduct before punitive damages constitutionally may be imposed. In deciding what types of misconduct are eligible for consideration for an award of punitive damages, fact-finders must be "guided by . . . more than an admonition to do what they think is best." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. at ____ (Brennan, J., concurring).

In many of the 45 States⁵ that allow punitive awards in civil cases, the fact-finder (usually a jury) is given unbridled discretion -- a standardless power -- to determine whether to impose punitive damages. While State requirements for determining whether a defendant should be

5. See Appendix for a list of the standards the States have adopted for imposing punitive damages.

assessed punitive damages are not uniform, they often require only that the jury find some vague type of misconduct. See, e.g., Arizona and Kansas (in Appendix). Cf. *Smith v. Wade*, 461 U.S. 30, 48 (1983). Beyond this, there is nothing to safeguard against the arbitrary and capricious imposition of punitive damages against a defendant. Moreover, there is no safeguard against a jury's consideration of extraneous emotional factors in making that award. The law in many States, including that in Alabama at the time of the punitive damage award in this case,⁶ lacks any standard to guide the jury in determining whether the alleged misconduct merits an award of punitive damages. There is nothing to focus the jury's attention on the precise circumstances of the defendant's alleged misconduct and to insure that a particularized consideration of the relevant aspects of each defendant's conduct is made before a punitive damage award is imposed.

The Due Process Clause requires, at minimum, that a State establish a range of discretion within which the fact-finder operates when deciding whether to impose punitive damages against a particular defendant.

(a) Aims Of Punitive Damages

If punitive damages are to serve their punitive and deterrent purposes, the focus, necessarily, must be on "the character of the tortfeasor's conduct -- whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Smith v. Wade*, 461 U.S. at 54 (emphasis added). Due process demands that a State's purported purposes of punishing a defendant for misconduct and deterring like conduct in the future be balanced against the defendant's ability actually to avoid such future wrongful conduct. If the defendant, or others similarly situated, cannot take steps to avoid similar conduct in the

6. Alabama amended its law of punitive damages, effective June 11, 1987, but that change did not apply to the award of punitive damages made in this case. See 1987 Alabama Acts, No. 87-185.

future, it is arbitrary and irrational to impose punishment with the goal to alter future behavior.

Conduct involving some sort of wrongful motive, actual intention to inflict harm or the conscious doing of an act known to be unlawful involves a degree of consciousness, a state of mind, and, therefore, the element of choice. Where the element of choice exists, one can choose whether to undertake such conduct or whether to refrain from it. Cf. *Morissette v. United States*, 342 U.S. 246, 250 (1952) (This principle "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.") Accordingly, punishing such wrongful conduct is fair and seeking to deter like future conduct by an award of punitive damages is rational. In contrast, however, if the conduct that the State seeks to punish or that the State seeks to deter is void of any conscious or mental element, thereby eliminating the aspect of choice, the punishment and deterrent purposes are futile.⁷

(b) Punishment Goal

Rational, non-arbitrary punishment can be imposed against only misconduct that demonstrates a mental state or that the actor is able to control or prevent. A simple example will show that an actor's mental state has a great influence on our legal (and moral) evaluation of his act. We are not angry -- except perhaps for a moment before we come to our senses -- with a person who trips us by accident. But we are angry with the person who *tries*, albeit unsuccessfully, to trip us up. Yet the first has hurt us and the second has not. The difference is that the second

7. Some States, for instance, permit punitive damage awards merely upon a showing of very careless or negligent conduct by the defendant -- "gross negligence" or "recklessness." See Appendix (e.g., Florida, New Mexico, North Carolina and Texas). These types of conduct differ fundamentally from the conduct described above because they involve the *absence* of a mental element.

intended harm, while the first did not. We have the belief that a person *ought not to try* to do us harm. If it happens by accident, we assign no moral culpability to the act. In contrast, if the act is intentional, it is morally blameworthy, even if it is ultimately unsuccessful.⁸

Likewise, punishing an act or condition, or some behavior, that a person or entity is unable to control or to take feasible precautions against is repugnant and irrational. Although "this Court has never articulated a general constitutional doctrine of *mens rea*," *Powell v. Texas*, 392 U.S. 514, 535 (1968), required before punishment may be imposed against particular conduct, it is clear that conduct that the actor cannot control or prevent cannot be punished.

There is no rational connection between the punishment imposed and the alleged "misconduct" where there has been no choice or conscious failure to choose by the actor or where the conduct cannot be controlled or prevented. Accordingly, due process prohibits imposition of punitive damages absent a finding of some intent to perform the act or omission causing the injury.

(c) Deterrence Goal

Deterrence is a rational aim against only misconduct that can be repeated. The deterrent value of a sanction depends, in part, on the precision used in defining the

8. "If a cow kicks a man in the face, the consequent physical hurt may equal that from a kick in the face with a hob-nailed boot, but the 'cussedness' of the cow raises no sense of outrage, while the malicious motive back of the boot kick adds materially to the victim's sense of outrage."

Smith v. Wade, 461 U.S. at 65 n.5 (Rehnquist, J., dissenting) (quoting *Wise v. Daniel*, 221 Mich. 229, 233, 190 N.W. 746, 747 (1922)).

contexts in which it may be invoked. It is true that some courts have attempted rigidly and specifically to define, for instance, what constitutes negligence, or recklessness, under a given, likely repeatable factual circumstance. See *Baltimore & Ohio R. Co. v. Goodman*, 275 U.S. 66 (1927) (Holmes, J.) (motorist required to stop, look and listen at level-grade railway crossing). But, by and large, courts view their task as defining whether a given actor's conduct on a particular occasion has fallen below the objective standard of care. Often there is no intimation of whether *as a matter of law* such behavior inevitably will be considered negligent, or even reckless, in similar future instances. The less specific the definition of conduct is, the less effective it can be as a guide to be used by individuals in shaping their future course of conduct.

A fundamental point that must be considered in evaluating whether deterrence can, in fact, be a State's legitimate, rational aim against conduct not involving choice or control is that deterrence, in such situations, is always a function of the controllability and recurrence of a given risk-creating or harm-causing situation. Where harm results from a causal chain not readily capable of exact or even similar repetition, a finding that an actor's particular conduct in a given factual situation was wrongful cannot serve as a future incentive to that actor or to others to conform their future behavior to a correct standard of action.

Deterrence is a possible objective only where it can be assumed that the "data learned *ex post* give *useful guidance for altering future behavior*." See Calabresi and Klevorick, *Four Tests For Liability In Torts*, 14 J. Legal Studies 585, 596 (1985) (emphasis added). But where "our probability beliefs about the future are unchanged by the accident's occurrence . . . , [what was] a sensible risk-benefit assessment before the accident remains a sensible one now." *Id.* at 599. Such assessments can, however, be made only in factual settings that are controllable by the actor and are capable of similar or identical recurrence.

Recurrence of a particular activity in an identical or similar fashion is possible, however, (except only by

coincidence) only where the elements of choice or control are part of the conduct. In such instances, deterrence is possible, and therefore rational, because the penalty imposed *can* alter the actor's choice of conduct.

(d) Threshold Mental-State Requirement

Therefore, punishment and deterrence can be effective, and are rational, only where the "character of the tortfeasor's conduct," *Smith v. Wade*, 461 U.S. at 54, contains a requisite (and sufficiently precisely defined) mental state or where the actor effectively can control or prevent the conduct. That the requirement of a certain degree of control or a certain mental state is part of our ordered sense of justice and fairness is evident from the numerous statutory enactments passed within the last few years in various States in different regions of the country regarding punitive damages. Cf. Appendix (e.g., Iowa and Minnesota).

A standard that requires only that conduct be "outrageous," "callous," "indifferent to the rights of others," "grossly negligent" or "reckless," without also requiring a mental element of intent, willfulness, consciousness or deliberateness, allows punitive damages to be awarded without a rational purpose.⁹

9. The requirement that there be a certain threshold mental state before conduct may be considered truly reprehensible and warranting punishment is not new. Section 523 of the Bankruptcy Reform Act of 1978, Pub.L. 95-598, 92 Stat. 2549, exempts from discharge an individual debtor's debt when that debt is "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. §523(a)(6). "Willful" means deliberate or intentional." House Rep. No. 95-595 at 365, 95th Cong., 1st Sess. (1977) (accompanying 1978 Act). Congress specifically overruled the "reckless disregard" standard that this Court had imposed in *Tinker v. Colwell*, 139 U.S. 473 (1902), on a predecessor section in the Bankruptcy Act of 1898.

A standard of misconduct demanding inquiry into the mental state of the defendant has been adhered to previously by the Court, although not in a constitutional context. In *Milwaukee & St. Paul R. Co. v. Arms*, 91 U.S. 489 (1876), a diversity case, the verdict was reversed because the jury was charged erroneously that it might award punitive damages on a finding of "gross negligence." The Court held that it was error to give an instruction that "gross negligence" would support a finding of punitive damages.¹⁰ The Court stated:

To [impose punitive damages], there must have been some *willful* misconduct, or that entire want of care which would raise the presumption of a *conscious* indifference to consequences.

91 U.S. at 495 (emphasis added).

The meaning of the *Arms* decision was underscored by *Western Union Telegraph Co. v. Eyser*, 91 U.S. 495 (1876), decided the same day. In *Western Union*, Justice Davis, who also authored *Arms*, wrote for a unanimous Court in holding that to merit an award of punitive damages, wrongful

10. "Gross negligence" is "an anomaly and contradiction in terms," and "[m]uch of what constitute[s] gross negligence . . . constitute[s] a high percentage of ordinary negligence." *Bielski v. Schulze*, 16 Wis.2d 1, 18, 114 N.W.2d 105, 112-13 (1962). Likewise, there "is often no clear distinction at all between ['recklessness'] and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence." W.P. Kecton, *Prosser and Kecton on Law of Torts* §34 at 214 (5th ed. 1984).

conduct must be characterized by "willfulness" or "intent."
*Id.*¹¹

Although decided on the basis of "federal common law," the holdings in *Arms* and *Western Union* underscore the validity of a similar requirement in the context of the Due Process Clause. Whether misconduct is characterized by "willfulness," "intent," "consciousness," "deliberateness," "maliciousness," "vindictiveness," "fraud," or "wantonness" is immaterial. Each requires a certain mental state on the part of the actor and each connotes the element of choice and, concomitantly, control or prevention. Where the elements of choice or control exist, there is a rational connection between the State's goals of punishment and deterrence and the actor's misconduct. There is fundamental fairness because the defendant-actor could have acted differently but chose not to do so. A mere showing of very careless or negligent conduct by the defendant -- "gross negligence," "recklessness,"

-
11. The Reporter of Decisions only summarized the *Western Union* case. The opinion is, however, reported in full at 23 L.Ed. 377. It reads as follows:

The decision just rendered in . . . *Arms* . . . controls this case. In no view of the evidence was the court justified in instructing the jury that exemplary damages could be recovered. The omission to station flag sentinels or to give some other proper warning, while the men were engaged in putting up the [telegraph] wire, was an act of negligence, entitling the plaintiff to compensatory damages. But there was nothing to authorize the jury to consider this omission as *willful*. On the contrary, the evidence rebuts every presumption that there was any *intentional* wrong.

23 L.Ed. 377 (emphasis added).

or "extreme carelessness" -- does not satisfy the required threshold standard of conduct for punitive damages because the requisite mental element is completely lacking.

Petitioner's conduct does not meet the constitutional threshold for an award of punitive damages. Because there was no evidence that petitioner engaged in deliberate or conscious misconduct towards respondents, the award of punitive damages against it is unconstitutional.

CONCLUSION

For the reasons stated above, the judgment of the Alabama Supreme Court should be reversed and the case remanded for a new trial on only compensatory damages.

Respectfully submitted,

Donald V. Jernberg
**OPPENHEIMER WOLFF
& DONNELLY**
Two Illinois Center
233 N. Michigan Avenue
Chicago, Illinois 60601
Telephone: (312) 819-4670

Thomas P. Kane
(*Counsel of Record*)
Ross F. Plaetzer
**OPPENHEIMER WOLFF
& DONNELLY**
1700 First Bank Building
St. Paul, Minnesota 55101
Telephone: (612) 223-2500

Counsel for Amici Curiae

June 1, 1990

APPENDIX

Alabama: (conscious or deliberate oppression, fraud, wantonness or malice; including reckless disregard for rights and safety of others) Ala. Code § 6-11-20

Alaska: (outrageous conduct; including reckless indifference to rights of others and conscious action in deliberate disregard of their rights) Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1978), *overruled on other grounds*, Dura Corp. v. Harned, 703 P.2d 396 (Alaska 1985)

Arizona: (outrageous conduct done with bad motive or with reckless indifference to interest of others) Smith v. Chapman, 115 Ariz. 211, 564 P.2d 900 (1977)

Arkansas: (wantonness or conduct with such conscious indifference to consequences that malice might be inferred) Freeman v. Anderson, 279 Ark. 282, 651 S.W.2d 250 (1983)

California: (oppression, fraud or malice; including willful and conscious disregard for rights and safety of others) Cal. Civil Code § 3294

Colorado: (circumstances of fraud, malice or willful and wanton conduct) Colo. Rev. Stat. § 13-21-102

Connecticut: *In products liability actions:* (reckless disregard for safety of product users, consumers and others) Conn. Gen. Stat. § 52-240b

In tort actions generally: (reckless indifference to rights of others or intentional and wanton violation of those rights) Garland v. Heyman, 203 Conn. 616, 525 A.2d 1343 (1987)

Delaware: (evil motive or conscious indifference to rights of others) Jardel Co. v. Hughes, 523 A.2d 518 (Del.1987)

District of Columbia: (fraud, ill will, recklessness, wantonness, willful disregard of plaintiff's rights or other circumstances tending to aggravate the injury) Franklin Investment Co. v. Homburg, 252 A.2d 95 (D.C.1969)

Florida: (gross and flagrant negligence evidencing reckless disregard for human life) White Const. Co. v. Dupont, 455 So. 2d 1026 (Fla. 1984)

Georgia: (willful misconduct, malice, fraud, wantonness, oppression, or entire want of care that would raise presumption of conscious indifference to consequences) Ga. Code § 51-12-5.1

Hawaii: (wanton or oppressive conduct as implies a spirit of mischief or criminal indifference to civil obligations; or misconduct that raises presumption of conscious indifference to consequences) Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989)

Idaho: (oppressive, fraudulent, wanton, malicious or outrageous conduct) Idaho Code § 6-1604

Illinois: (malicious or wanton conduct) Kimes v. Trapp, 52 Ill. 2d 442, 202 N.E.2d 42 (1964)

Indiana: (willful and wanton misconduct) Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019 (Ind. 1986)

Iowa: (willful and wanton disregard for the rights or safety of others) Iowa Code § 668A.1

Kansas: (wanton and reckless disregard for plaintiff's rights) W-V. Enterprises v. Federal S & L, 234 Kan. 354, 673 P.2d 1112 (1983)

Kentucky: (oppression, fraud or malice) Ky. Rev. Stat. § 411.184

Louisiana: (punitive damages not generally allowed) Richard v. State, 390 So.2d 882 (La. 1980)

Maine: (malice, including deliberate conduct so outrageous as to imply malice) Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985)

Maryland: (malice, actual or implied) Miller Building Supply, Inc. v. Rosen, 305 Md. 341, 503 A.2d 1344 (1986)

Massachusetts: (punitive damages not normally recoverable) Caperei v. Huntoon, 397 F.2d 799 (1st Cir. 1968) (dictum)

Michigan: (malicious or so willful and wanton as to demonstrate reckless disregard for rights of others) Bailey v. Graves, 411 Mich. 510, 309 N.W.2d 166 (1981)

Minnesota: (deliberate disregard for rights and safety of others) Minn. Stat. § 549.20, subd. 1(a)

Mississippi: (gross negligence that indicates reckless or wanton disregard for safety of others) Mississippi Power Co. v. Jones, 369 So.2d 1381 (Miss. 1979)

Missouri: (wanton, willful or outrageous act or reckless disregard for act's consequences) Burnett v. Griffith 769 S.W.2d 780 (Mo. banc 1989)

Montana: (actual fraud or malice) Mont. Code Ann. § 27-1-221

Nebraska: (punitive damages not recoverable), 200 Neb. 1, 261 N.W.2d 766 (1978)

Nevada: (oppression, fraud or malice, express or implied) Nev. Rev. Stat. § 42.005

New Hampshire: (punitive damages not awarded unless authorized by statute) N.H. Rev. Stat. Ann. § 507.16

New Jersey: (actual malice or wanton disregard of others' safety) N.J. Stat. Ann. § 2A:58C-5

New Mexico: (gross negligence, malice or other circumstances of aggravation) Gray v. Esslinger, 46 N.M. 421, 130 P.2d 24 (1942)

New York: (evil or wrongful motive or reckless indifference equivalent thereof) Le Mistral, Inc. v. Columbia Broadcasting System, 61 A.D.2d 491, 402 N.Y.S. 2d 815 (1978)

North Carolina: (gross or wanton negligence) Paris v. Michael Kreitz, Jr. P.A., 75 N.C. App. 365, 331 S.E.2d 234

North Dakota: (oppression, fraud or malice, actual or presumed) N.D. Cent. Code § 32-03.2-11

Ohio: (flagrant disregard for safety of persons who might be harmed) Ohio Rev. Code Ann. § 2307.80

Oklahoma: (wanton or reckless disregard for rights of another, oppression, fraud or malice) Okla. Stat. Ann. tit. 23 § 9

Oregon: (wanton disregard for health, safety and welfare of others) Or. Rev. Stat. § 30.925

Pennsylvania: (evil motive or reckless indifference to rights of others) Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984)

Rhode Island: (willfulness, recklessness or wickedness) Sherman v. McDermott, 114 R.I. 107, 329 A.2d 195 (1974)

South Carolina: (Willful, wanton or in reckless disregard of plaintiff's rights) Cohen v. Allendale Coca-Cola Bottling Co., 291 S.C. 35, 351 S.E.2d 897 (App. 1985)

South Dakota: (willful, wanton or malicious conduct) S.D. Comp. Laws Ann. § 21-1-4.1

Tennessee: (fraud, malice, oppression, conscious indifference to consequences or gross negligence) Island Container Corp. v. March, 529 W.2d 43 (Tenn. 1975)

Texas: (fraud, malice or gross negligence) Tex. Stat. Ann. art. § 41.003

Utah: (willful, intentionally fraudulent or knowing and reckless indifference to rights of others) Utah Stat. § 78-18-1

Vermont: (actual malice, including reckless disregard of rights) Shortle v. Central Vermont Pub. Serv. Corp., 137 Vt. 32, 399 A.2d 517 (1979)

Virginia: (malice, or such recklessness or negligence as evinces a conscious disregard of rights of others) Booth v. Robertson, 236 Va. 269, 374 S.E.2d 1 (1988)

Washington: (punitive damages not allowed absent specific statutory authorization) Kammerer v. Western Gear Corp., 96 Wash. 2d 416, 635 P.2d 708 (1981)

West Virginia: (gross fraud, malice, oppression or wanton, willful or reckless conduct, or criminal indifference to civil obligations affecting rights of others) Wells v. Smith, 297 S.E.2d 872 (W.V. 1982)

Wisconsin: (malicious, willful or wanton conduct in reckless disregard of rights or interests of others) Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980)

Wyoming: (wanton and willful misconduct) Weaver v. Mitchell 715 P.2d 1361 (Wyo. 1986)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN
and EDDIE HALGROVE,
Respondents.

On Writ Of Certiorari To The
Supreme Court of Alabama

**BRIEF AMICI CURIAE OF AETNA LIFE INSURANCE
COMPANY, ALLSTATE INSURANCE COMPANY,
BANKERS LIFE AND CASUALTY COMPANY,
THE OHIO CASUALTY INSURANCE COMPANY
AND RESERVE LIFE INSURANCE COMPANY
IN SUPPORT OF PETITIONER**

Of Counsel:

ARTHUR A. PALMUNEN
AETNA LIFE INSURANCE
COMPANY

JOHN B. REINIERS
ALLSTATE INSURANCE COMPANY

ROBERT R. SHEEHAN
BANKERS LIFE AND CASUALTY
COMPANY

JOHN H. REHM, JR.
THE OHIO CASUALTY
INSURANCE COMPANY

GEORGE R. KATOSIC
RESERVE LIFE INSURANCE
COMPANY

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Amici Curiae

**Counsel of Record*

Of Counsel:

THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER

QUESTION PRESENTED

Amici shall address the following question:

Whether the Due Process Clause of the Fourteenth Amendment prohibits the imposition of a punitive damage award in a case in which the applicable state law does not establish the maximum punishment to which a defendant may be exposed for conduct found to warrant punishment.

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
A. Punitive Damages Are <i>Ad Hoc</i> , Capricious and Essentially Limitless Punishments Im- posed Without Standards, Uniformity or Predictability	7
B. Colonial and Early American Jurisprudence Rejected the Concept That Punishment Could Be Inflicted Without Express, Pre-Estab- lished Limits	12
C. The Establishment of a Range of Penalties Is a Quintessentially Legislative Task That Is Necessary to the Fulfillment of Punish- ment's Theoretical Goals of Retribution and Deterrence	16
D. The Due Process Clause Requires Legisla- tively Established Limits on the Maximum Punitive Damage Award Permissible for a Particular Type of Misconduct	24
CONCLUSION	27

TABLE OF AUTHORITIES

CASES:	Page
<i>A.B. Small Co. v. American Sugar Ref. Co.</i> , 267 U.S. 233 (1925)	25
<i>Ace Truck & Equipment Rentals, Inc. v. Kahn</i> , 746 P.2d 132 (Nev. 1987)	9
<i>Aetna Life Insurance Co. v. Lavoie</i> , 475 U.S. 813 (1986)	1,8
<i>Allis-Chalmers Corp. v. Leuck</i> , 471 U.S. 202 (1985)	4
<i>Bankers Life and Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988)	2,5,9
<i>Bankers Life and Casualty Co. v. Crenshaw</i> , 483 So. 2d 254 (Miss. 1985)	9
<i>Berra v. United States</i> , 351 U.S. 131 (1956)	25
<i>Bigelow v. RKO Radio Pictures, Inc.</i> , 327 U.S. 251 (1946)	7
<i>Bloom v. Illinois</i> , 391 U.S. 194 (1968)	17
<i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964) ...	27
<i>Browning-Ferris Industries of Vermont, Inc. v.</i> <i>Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989)	7-8,12,18
<i>Burnham v. Superior Court of California</i> , No. 89- 44 (U.S. May 29, 1990)	14
<i>Calder v. Bull</i> , 3 U.S. (3 Dall.) 386 (1798)	14,27
<i>Central Alabama Electric Cooperative v. Tapley</i> , 546 So. 2d 371 (Ala. 1989)	6,12
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	18
<i>D'Ambrosio v. Pennsylvania National Mutual Cas-</i> <i>ualty Insurance Co.</i> , 494 Pa. 501, 431 A.2d 966 (1981)	4
<i>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985)	18-19
<i>Eichenseer v. Reserve Life Insurance Co.</i> , 881 F.2d 1355 (5th Cir. 1989), <i>stay granted</i> , March 19, 1990 (A-620), <i>cert. pending</i> (No. 89-1303)	2

Table of Authorities Continued

	Page
<i>Eichenseer v. Reserve Life Insurance Co.</i> , 894 F.2d 1414 (5th Cir. 1990) (dissent from denial of rehearing <i>en banc</i>)	3,8,23,24
<i>Electrical Workers v. Foust</i> , 442 U.S. 42 (1979) ..	18
<i>Fay v. Parker</i> , 53 N.H. 342 (1872)	11,12
<i>G. Amador Corp. v. The Ohio Casualty Insurance Co.</i> , No. B029795 (Cal. Ct. App. Dec. 28, 1989), stay granted, April 17, 1990 (A-713)	3,10
<i>Giaccio v. Pennsylvania</i> , 382 U.S. 399 (1960)	16
<i>Gore v. United States</i> , 357 U.S. 386 (1958)	17-18
<i>Green v. United States</i> , 356 U.S. 165 (1958)	16
<i>Hawkins v. Allstate Insurance Co.</i> , 152 Ariz. 490, 733 P.2d 1073, cert. denied, 484 U.S. 874 (1987)	3
<i>Hicks v. Feiock</i> , 485 U.S. 624 (1988)	7,17
<i>Hospital Authority of Gwinnett County v. Jones</i> , 386 S.E.2d 120 (Ga. 1989), cert pending (No. 89-1315)	9
<i>Lanzetta v. New Jersey</i> , 306 U.S. 451 (1939)	25
<i>Los Angeles Dept. of Water & Power v. Manhardt</i> , 435 U.S. 702 (1978)	5
<i>McNamara v. King</i> , 7 Ill. (2 Gilm.) 432 (1845)	11
<i>Miller v. Florida</i> , 482 U.S. 423 (1987)	14,27
<i>Miller v. Schnitzer</i> , 78 Nev. 301, 371 P.2d 824 (1962)	7
<i>Mistretta v. United States</i> , 109 S. Ct. 647 (1989) .	15
<i>Prentis v. Atlantic Coast Line Co.</i> , 211 U.S. 210 (1908)	17
<i>Rosenberg v. United States</i> , 346 U.S. 273 (1953) ..	18

Table of Authorities Continued

	Page
<i>Rosenbloom v. Metromedia, Inc.</i> , 403 U.S. 29 (1971)	19,27
<i>Rummel v. Estelle</i> , 445 U.S. 263 (1980)	18
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984)	27
<i>Simmons v. General American Life Insurance Co.</i> , No. 87-1339 (Ala. Dec. 22, 1989), stay pending (A-845)	4
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	10,18
<i>Standard Life Insurance Co. of Indiana v. Veal</i> , 354 So. 2d 239 (Miss. 1977)	9
<i>Standard Oil Co. v. Missouri</i> , 224 U.S. 270 (1912)	25,26
<i>Taylor v. Hayes</i> , 418 U.S. 488 (1974)	17
<i>The Ohio Casualty Insurance Co. v. G. Amador Corp.</i> , stay granted, April 17, 1990 (A-713)	3,10
<i>Thompson v. Oklahoma</i> , 487 U.S. 815 (1988)	18
<i>Tison v. Arizona</i> , 481 U.S. 137 (1987)	21
<i>Tull v. United States</i> , 481 U.S. 412 (1987)	24
<i>Tullidge v. Wade</i> , 3 Wils. K.B. 18, 95 Eng. Rep. 909 (C.P. 1769)	11
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979) .	25
<i>United States v. Grayson</i> , 438 U.S. 41 (1978)	14,15
<i>United States v. Halper</i> , 109 S. Ct. 1892 (1989) ..	16
<i>United States v. Hudson</i> , 11 U.S. (7 Cranch) 31 (1812)	14
<i>Waters-Pierce Oil Co. v. Texas</i> , 212 U.S. 86 (1909)	26
<i>Weaver v. Graham</i> , 450 U.S. 24 (1981)	17,27
<i>Young v. United States ex. rel. Vuitton et Fils</i> , 481 U.S. 787 (1987)	10

Table of Authorities Continued

	Page
CONSTITUTION, STATUTES AND RULES:	
U.S. Const. Art. I, § 10, Cl. 1 (Ex Post Facto Clause)	27
Eighth Amendment	18
Fourteenth Amendment (Due Process Clause)	<i>passim</i>
Sentencing Reform Act, 28 U.S.C. § 991(b)(1)	15
STATE STATUTES:	
Ala. Penal Code §§ 91, <i>et seq.</i> (1866)	14
Pa. H.B. 121, § 3, <i>amending Pa. Code</i> , ch. 83, tit. 43	4
LEGISLATIVE MATERIALS:	
S. Rep. No. 225, 98th Cong., 1st Sess. (1983)	15
MISCELLANEOUS:	
S. Benn, <i>Punishment</i> , 7 <i>Encyclopedia of Philosophy</i> (1967)	21
J. Bentham, <i>An Introduction to the Principles of Morals and Legislation</i> (C. Wilson & R. McCallum ed. 1945)	20
J. Bentham, <i>The Rationale of Punishment</i> (1830)	16, 19, 20, 21
L. Berkson, <i>The Concept of Cruel and Unusual Punishment</i> (1975)	16, 21
4 W. Blackstone, <i>Commentaries on the Laws of England</i> (13th ed. 1800)	19, 21-22
H. Dagge, <i>Consideration on Criminal Law</i> (1772)	21
M. Frankel, <i>Criminal Sentences</i> (1972)	13
L. Friedman, <i>A History of American Law</i> (2d ed. 1985)	13
E. van der Haag, <i>Punishing Criminals</i> (1975)	21

Table of Authorities Continued

	Page
W. Hale, <i>Handbook on the Law of Damages</i> (2d ed. 1912)	12
H.L.A. Hart, <i>Punishment and Responsibility</i> (1968)	16, 21
Morris, <i>Punitive Damages in Tort Cases</i> , 44 Harv. L. Rev. 1173 (1931)	10, 22-23
W. Paley, <i>The Principles of Moral and Political Philosophy</i> (6th ed. London 1788)	21
M. Peterson, S. Sarma & M. Shanley, <i>Punitive Damages</i> (Rand Inst. for Civil Justice 1987) ..	5
E. Pincoffs, <i>The Rationale of Legal Punishment</i> (1966)	20, 21
P. Reinsch, <i>English Common Law in the Early American Colonies</i> (1977)	13
B. Schwartz, <i>The Bill of Rights: A Documentary History</i> (1980)	13
<i>The Laws of The Pilgrims</i> (J. Cushing ed. 1977) ..	13

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN
and EDDIE HALGROVE,
Respondents.

**On Writ Of Certiorari To The
Supreme Court Of Alabama**

**BRIEF AMICI CURIAE OF AETNA LIFE INSURANCE
COMPANY, ALLSTATE INSURANCE COMPANY,
BANKERS LIFE AND CASUALTY COMPANY,
THE OHIO CASUALTY INSURANCE COMPANY
AND RESERVE LIFE INSURANCE COMPANY
IN SUPPORT OF PETITIONER**

INTEREST OF THE AMICI CURIAE

Amicus Aetna Life Insurance Company challenged in this Court the "lack of standards governing punitive damages in Alabama" under the Due Process Clause of the Fourteenth Amendment in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986), in which the Court first recognized that the stan-

dardless discretion of juries to impose punitive damages raises "important" federal constitutional questions.

Two years later, in *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), amicus Bankers Life and Casualty Company argued to this Court that the unfettered discretion of juries to inflict punitive damages in virtually unlimited amounts pursuant to vague, retroactively applied standards violated the Due Process Clause.

In a case presently on this Court's docket, amicus Reserve Life Insurance Company seeks review of a \$500,000 punitive damage award imposed by a United States District Court after a bench trial for "bad faith" delay in paying an insurance claim based upon Reserve's alleged violation of a substantive standard of conduct that was created by judicial decision four years after the conduct at issue. *Eichenseer v. Reserve Life Insurance Co.*, 881 F.2d 1355 (5th Cir. 1989), *stay granted*, March 19, 1990 (A-620), *cert. pending* (No. 89-1303). The United States Court of Appeals for the Fifth Circuit, like the Supreme Court of Alabama in the case at bar, held that a potpourri of "factors" applied by the trial court in determining the amount of the award sufficiently constrained the power to punish for purposes of the Due Process Clause, and affirmed the judgment. *Id.*, at 1363. Judge Jones, joined by Judges Gee, Jolly, and Smith, dissented from denial of rehearing *en banc* in *Reserve Life* on the grounds that the "bad faith refusal tort . . . mocks our notions of fundamental fairness embodied in the Due Process Clause" because it simultaneously deprives defendants of advance notice of "the conduct

that could result in punitive damage awards" and gives courts and juries "unbridled discretion to punish" for engaging in such conduct. 894 F.2d 1414, 1415 (5th Cir. 1990).

Amicus The Ohio Casualty Insurance Company was recently assessed with a \$10,000,000 punitive damage award by a California jury for alleged bad faith handling of an insurance claim; the punishment was affirmed by a California Court of Appeal in an "unpublished" opinion that rejected Ohio's federal due process objections to punishment in the absence of an express statutory range of penalties. *G. Amador Corp. v. The Ohio Casualty Insurance Co.*, B029795 (Cal. Ct. App. Dec. 28, 1989), *stay granted*, April 17, 1990 (A-713) (O'Connor, Circuit Justice). The Supreme Court of California, consistent with its practice in recent years to refuse to examine the constitutionality of seven- and eight-digit punitive damage awards, denied review.

Amicus Allstate Insurance Company has similarly experienced first hand the results of uninhibited punitive damage verdicts and the refusal of courts to exercise meaningful control over such verdicts under either state law or federal constitutional principles. For example, in 1987 the Supreme Court of Arizona reinstated a \$3,500,000 punitive damage award against Allstate in a bad faith case notwithstanding Allstate's objections to the award under the Due Process Clause of the Fourteenth Amendment. *See Hawkins v. Allstate Insurance Co.*, 152 Ariz. 490, 733 P.2d 1073 (Ariz.), *cert. denied*, 484 U.S. 874 (1987).

Amici collectively conduct their respective insurance businesses in all fifty States and, each day, process thousands of insurance claims. In most of those jur-

isdictions, a mistake or delay in handling a claim may result in an unpredictable and excessive punitive damage award because of a determination, made years later, that the claim should have been handled with greater sensitivity or less frugality. In addition to the amorphous common law fraud concepts applied in the case at bar,¹ the courts and legislatures of many States have authorized unlimited punitive damage awards for "bad faith" failure to pay an insurance claim, a new form of tort that has been recognized by this Court as nothing "more than a way to plead a certain kind of contract violation . . . in order to recover exemplary damages not otherwise available under [state contract] law." *Allis-Chalmers Corp. v. Leuck*, 471 U.S. 202, 217 (1985).²

¹ Since its decision in this case, the Supreme Court of Alabama has again rejected a Due Process Clause challenge to a punitive damage award imposed vicariously against an insurance company on the basis of the alleged fraud of an independent sales agent. *Simmons v. General American Life Insurance Co.*, No. 87-1339 (Ala. Dec. 22, 1989) (affirming \$600,000 punitive damage award), *stay pending* (A-845).

² For example, in February 1990 the Pennsylvania legislature passed and its Governor signed into law H.B. 121 authorizing "bad faith" actions and the imposition of unlimited punitive damages based upon a finding that an insurer has "acted in bad faith." Pa. H.B. 121, § 3, *amending Pa. Code*, ch. 83, tit. 42 (signed Feb. 7, 1990) (adding § 8371). As is typical in this area of the law, the legislation does not even purport to define the term "bad faith," which has also not been defined by the Pennsylvania courts because those courts have in the past refused even to recognize a bad faith right of action. *See, e.g., D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co.*, 494 Pa. 501, 431 A.2d 966 (Pa. 1981).

This "tortification of contract law"³ has converted civil justice systems into uncontrolled and manifestly erratic organisms that have begun to supersede criminal justice systems as the arenas in which to punish and deter conduct perceived to be antisocial. The virtually unlimited monetary punishments that can be inflicted in these cases because a defendant "acts with a certain mental state," *Bankers Life*, 486 U.S., at 87 (O'Connor, J., concurring), injects enormous uncertainties into an area of the law in which predictability and regularity are of particular importance. *See Los Angeles Dept. of Water & Power v. Manhardt*, 435 U.S. 702, 721 (1978) (discussing the deleterious effect of "[d]rastic changes in the legal rules governing . . . insurance funds").

Amici contend that the Due Process Clause of the Fourteenth Amendment precludes judicially imposed punishments absent *advance* notice of the precise public wrong for which society will extract punishment and *advance* notice of the range of penalties that might be inflicted for that specific conduct.⁴

SUMMARY OF ARGUMENT

Punitive damages are intended not to compensate for an injury inflicted but to impose an extracompensatory punishment for conduct that is perceived to be antisocial. As is true in most jurisdictions today,

³ M. Peterson, S. Sarma & M. Shanley, *Punitive Damages* iv (Rand Inst. for Civil Justice 1987).

⁴ The Court need not determine in this case the circumstances under which a punitive damage award within a legislatively established range of punishments could be subject to additional constitutional limitations under the Due Process Clause.

the Alabama regime that produced the \$1,077,978 punishment⁴ in this case authorizes the punishment for deviation from vague, evolving and elastic "standards" and permits unfettered discretion to render a punishment in virtually any amount. The court below has stated that it "can envision no set of carved-in-granite standards that would guide every jury" in punitive damage cases because "the *degree* of punishment necessary to achieve [the goals of punishment and deterrence] changes in every case" and in some cases "juries should be entitled to punish defendants so severely as to destroy them; justice demands that." *Central Alabama Electric Cooperative v. Tapley*, 546 So. 2d 371, 377 (Ala. 1989) (emphasis in original). Neither the jury nor the court below was constrained in any way by a legislative (or even common law) limit on the amount of punishment that could be inflicted against petitioner.

This unchecked license to impose a punishment in virtually any amount violates a fundamental principle underlying the Due Process Clause: that a State may impose punishment on its citizens only pursuant to standards established in advance. Historically, the responsibility for establishing appropriate levels and limits of punishment for antisocial conduct has been regarded as quintessentially that of the legislature. In the Colonies, the establishment of maximum punishments by statutes (or their equivalent) was commonplace, reflecting the Colonists' rejection of any system in which the severity of punishment was left to the *post hoc* discretion of juries or judges. By the time the Fourteenth Amendment was ratified, the States had uniformly rejected the concept of common law crimes by enacting comprehensive criminal codes

defining substantive crimes and establishing specific ranges of punishment for those crimes.

Punitive damages serve the same purposes as criminal sanctions. Their infliction in the absence of legislatively prescribed limits therefore departs from the historical pattern that the judicial imposition of punishment must be preceded by adequate notice and articulated limitations. States that permit the award of punitive damages in the absence of statutory limits deprive citizens of the notice that is the necessary antecedent for constitutional punishment under the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

A. Punitive Damages Are *Ad Hoc*, Capricious and Essentially Limitless Punishments Imposed Without Standards, Uniformity or Predictability

The tort system vests the factfinder with wide latitude to determine the amount of compensatory damages⁵ necessary to make a plaintiff whole for actual injuries to redress a private wrong, but at least the compensatory function provides some theoretically objective guidance.⁶ In assessing punitive damages, however, judges and juries are "guided by little more than an admonition to do what they think is best." *Browning-Ferris Industries of Vermont, Inc. v. Kelco*

⁴ See, e.g., *Miller v. Schnitzer*, 78 Nev. 301, 371 P.2d 824, 828-29 (1962) ("The extent of such damage, by its very nature, falls peculiarly within the province of the trier of fact . . . [A]n appellate court will disallow or reduce the award if its judicial conscience is shocked; otherwise it will not."). Compare *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (jury need only make a "just and reasonable estimate").

⁵ Cf. *Hicks v. Feiock*, 485 U.S. 624, 647 (1988) (O'Connor, J., dissenting).

Disposal, Inc., 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring). Thus, in this case the jury was not informed what maximum punishment might be appropriate to fulfill society's objectives of retribution and deterrence in redressing the alleged public wrong; nor was it limited by any other meaningful standards or guidelines by which to make its ultimate determination of the severity of the punishment to impose on petitioner. The trial court could not provide the jury with such guidance because no fixed limitations or objective standards had been established in Alabama to aid civil juries in performing retrospectively in individual cases the role assigned prospectively and generically in criminal cases to the legislature—that of prescribing the limits of permissible punishments for particular offenses.

In fact, civil juries are entrusted with the power to punish and to establish *ad hoc* levels of punishment in cases in which the substantive standards are themselves in a state of constant evolution. See *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 822 (1986). In many punitive damages cases, the standard of liability is itself like “a predator lurking in the shadows to pounce on the unsuspecting.” *Reserve Life*, 894 F.2d, at 1420. (Jones, J., dissenting from denial of rehearing *en banc*).⁷ Having found liability under mercurial standards of conduct, civil juries are typically given

⁷ Although not to be considered in detail in this brief, amici submit that the uncertainty regarding *what* conduct will warrant punitive damages reinforces the contention that the Due Process Clause requires, at a minimum, that the upper limit of punishment be established in advance of the conduct subsequently alleged to warrant the imposition of punitive damages.

guidance no more explicit than that the amount of the award must be sufficient to punish and deter. See, e.g., *Standard Life Insurance Co. of Indiana v. Veal*, 354 So. 2d 239, 249 (Miss. 1977).

As Justice O'Connor has observed, “‘the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury.’” *Bankers Life*, 486 U.S., at 88 (O'Connor, J., concurring), quoting *Bankers Life and Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985). Given this state of affairs, no person potentially subject to punitive damages can possibly know in advance how much punishment a jury might impose. Moreover, appellate review is of no comfort because jury verdicts generally will be overturned only if the punitive award is subjectively perceived by appellate judges as “grossly and manifestly excessive,” *Browning-Ferris*, 109 S. Ct., at 2922 n.24, or happens to “‘shock [the] judicial conscience.’” *Hospital Authority of Gwinnett County v. Jones*, 386 S.E.2d 120, 126 (Ga. 1989), cert. pending (No. 89-1315); accord *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 746 P.2d 132, 137 (Nev. 1987) (punitive damage award will not be disturbed so long as it is “fair and just and reasonable [according to the] sense [of right and wrong] most of us possess from childhood”).

In affirming a \$10,000,000 punitive damage award against amicus Ohio Casualty, the California Court of Appeal justified this extremely vague and deferential standard of appellate review as follows: “The calculation of punitive damages involves a ‘fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties . . .’ and in this

regard juries have wide discretion in determining what is proper The more reprehensible the act, the greater the appropriate punishment." *G. Amador Corp. v. The Ohio Casualty Insurance Co.*, No. B029795, slip op., at 27-28 (Cal. Ct. App. Dec. 28, 1989) (unpublished) (citations omitted), *stay granted*, April 17, 1990 (A-713) (O'Connor, Circuit Justice).

This "fluid process" of punishment is activated in most cases by private prosecutors who seek not only full compensation for their own losses, but also a windfall punitive damage "bounty" as a reward for their efforts. *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). It is not surprising that private plaintiffs would in such circumstances seek to extract the largest possible punitive award irrespective of any relationship to the public purposes for which it is in theory inflicted. As has been observed, "[a] person who is to profit by the punishment of another is likely to prefer severe punishment to admonition which will best serve social ends, and the two are not necessarily synonymous" Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1178 (1931).⁸

⁸ The Court recently noted the incongruity of a similar arrangement in *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987). In that case, the Court exercised its supervisory power to preclude appointment of interested private litigants to prosecute criminal contempt actions against opposing private litigants, even though the system in question turned the punitive fine over to the government. In *Young*, Justice Blackmun expressed the view that such prosecutors must, as a matter of due process, be able to serve the public interest to the exclusion of any private interest; thus, he would have reached the same result as a matter of constitutional compulsion. *Id.*, at 815 (Blackmun, J., concurring).

The punitive damage system operates without giving advance notice of what punishment may be imposed for what conduct. That it operates in this fashion is primarily an historical accident. As in England,⁹ early punitive damage cases in this country confused the rationale for imposing "exemplary" damages, deeming them compensation for "intangible injuries" or ascribing dual compensatory and punitive justifications to jury awards that apparently exceeded the amount necessary to compensate for actual tangible injury. See, e.g., *McNamara v. King*, 7 Ill. (2 Gilm.) 432, 436 (1845). As the concept of actual damages expanded to include compensation for intangible injuries such as mental anguish, there was "nothing left for 'exemplary damages,' as formerly understood, to operate upon" and punitive damages generally came to be understood to refer to "punishment for the sake of public example" *Fay v. Parker*, 53 N.H. 342, 384 (1872). Because punitive damages were the product of the evolving common law tort compensation system, these monetary punishments imposed in ostensibly civil proceedings were, unlike monetary punishments imposed in criminal proceedings, left to the virtually unlimited, and rarely disturbed, discretion of the jury.

The inconsistency between having statutorily limited monetary punishments in criminal cases and unlimited monetary punishments in punitive damage cases did not go unnoticed. A commentator observed in 1912 that "[it] certainly appears to be an incongruity that one may be punished by the public for

⁹ See, e.g., *Tullidge v. Wade*, 3 Wils. K.B. 18, 95 Eng. Rep. 909 (C.P. 1769).

the crime . . . by a fine limited by statute, and again punished in favor of the sufferer . . . for the same act, by exemplary damages, with little limit on the discretion of the jury." W. Hale, *Handbook on the Law of Damages* §§ 87-88, at 306 (2d ed. 1912). The full impact of this limitless punishment regime on the civil justice system was not, however, felt until much later. As long as punitive damage awards were relatively rare and modest in amount, the system could tolerate an occasional aberration. The frequent and random imposition of massive punitive damage awards is a relatively recent phenomenon. See *Browning-Ferris*, 109 S. Ct., at 2924 (O'Connor, J., concurring and dissenting). In the last two decades, the doctrine transformed from a mere appendage to the tort compensation system designed to make a defendant "smart"¹⁰ into a full-fledged punishment scheme that, as the court below has recognized, permits juries to punish so severely as literally to destroy a defendant. See *Central Alabama Electric Cooperative*, 546 So. 2d, at 377.

B. Colonial and Early American Jurisprudence Rejected the Concept That Punishment Could Be Inflicted Without Express, Pre-Established Limits

The principle that limits on punishments must be prescribed in advance, and its corollary that judges and juries may not set such limits on an *ad hoc* basis, were incorporated in our jurisprudence when the first Colonists arrived on this continent in the early 17th Century. For example, Chapter III of "The General Laws and Liberties of New Plimouth Colony" sets forth a detailed scheme of punishments, including monetary punishments characterized simultaneously

¹⁰ See *Fay v. Parker*, 53 N.H., at 354.

as "ameracements" and "fines" which could be imposed upon conviction of a crime. See *The Laws of the Pilgrims* (J. Cushing ed. 1977) (unnumbered pages). The Colonists' rejection of the notion that a person could be punished without advance notice of the maximum punishment for particular conduct, was virtually universal. As stated in the Massachusetts Body of Liberties of 1642,

no mans person shall be arrested, restrayned, banished, dismembred, nor any wayes punished . . . unless it be by vertue or equities of some expresse law of the Country warranting same, established by a general Court and sufficiently published

1 B. Schwartz, *The Bill of Rights: A Documentary History* 78 (1980); see also P. Reinsch, *English Common Law in the Early American Colonies* 53 (1977) (codification of "essential elements of the law" was universally considered necessary in the Colonies).

In establishing this principle, the Colonists were implementing a precept of ancient lineage going back to the Latin canon, "Nullem crimen, nulla poena, sine lege," the modern translation of which is, "there can be no crime, and no punishment, except as the law prescribes it." M. Frankel, *Criminal Sentences* 3 (1972) (emphasis in original). The Colonists' acceptance of the concept "nulla poena, sine lege" was subsequently manifested in the States in the complete codification of the criminal law and, ultimately, the rejection of the concept of common law crimes. See L. Friedman, *A History of American Law* 573 (2d ed. 1985).¹¹ As of the time of the ratification of the

¹¹ In the early 19th Century, this Court rejected the concept

Fourteenth Amendment, nearly every State had enacted a comprehensive criminal code that defined punishable crimes and fixed maximum punishments.¹² (A compendium of those codes is reprinted in the Appendix hereto *infra*.) Moreover, as illustrated by the Court's recent unanimous decision in *Miller v. Florida*, 482 U.S. 423 (1987), this Court has assumed, at least since its decision in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), that no person can be punished for the commission of an offense deemed "criminal" unless an upper limit on the punishment has been announced prior to the commission of the acts leading to conviction.

Thus, in "the early days of the Republic . . . [e]ach crime had its defined punishment." *United States v. Grayson*, 438 U.S. 41, 45 (1978). The "'excessive rigidity of the [mandatory or fixed sentence] system'" gave way to a somewhat more flexible system that permitted the sentencing authority "to select a

of common law crimes at the federal level. It declared that prior to prosecution of a federal offense, Congress "must first make an act a crime [and] affix a punishment to it. . . ." *United States v. Hudson*, 11 U.S. (7 Cranch) 31, 34 (1812).

¹² In enacting these penal codes, the States rejected the notion of open-ended, unlimited punishments. See, e.g., *Ala. Penal Code* chs. 1-10 (1866) (punishing variety of offenses, including forgery, counterfeiting, larceny, embezzlement, murder, robbery, burglary, and arson); see *id.* § 91, 92, 101, 102, 104-110, 118, 123, 129, 130, 135, 136, 138, 140, 144, 148, 153-155, 157-159, 162, 177-184, 186-190, 192-207 (imposing maximum fines for a variety of offenses). The codification of criminal offenses with fixed maximum punishments throughout the States at and around the time of the ratification of the Fourteenth Amendment demonstrates the depth and breadth of the consensus among the several States on this question. Cf. *Burnham v. Superior Court of California*, No. 89-44, slip op., at 5-6 (U.S. May 29, 1990) (plurality opinion).

sentence within a *range* defined by the legislature." *Id.* at 46 (emphasis in original) (citations omitted); see also *Mistretta v. United States*, 109 S. Ct. 647, 650 (1989) (although "Congress early abandoned fixed-sentence rigidity [it] put in place a system of ranges within which the sentencer could choose the precise punishment"). Even under the "indeterminate sentencing" model adopted in some jurisdictions, the legislature "defined the maximum [and] the judge imposed a sentence within the statutory range." *Mistretta*, 109 S. Ct., at 651; *Grayson*, 438 U.S., at 47.¹³

This history demonstrates that woven into the fabric of our legal heritage are fundamental concepts that prohibit the imposition of punishment by the government in the absence of established limits. The rejection of unlimited monetary punishment in criminal cases casts grave doubt on the constitutionality of unlimited monetary punishments imposed by the States in civil cases. No principled constitutional distinction may be drawn between monetary sanctions that are imposed to punish and deter on the basis of whether such sanctions are labeled "criminal" or "civil" or whether they are assessed in criminal or

¹³ The Sentencing Reform Act, 28 U.S.C. § 991(b)(1), was enacted, in relevant part, in response to the problems of uncertainty and inconsistency in sentencing resulting from the "unfettered discretion" conferred upon sentencing judges to impose punishment "within the statutory range fixed by Congress." *Mistretta*, 109 S. Ct., at 651; S. Rep. No. 225, 98th Cong., 1st Sess. 38-40 (1983). It is more than ironic that civil juries empowered to impose punitive damages possess vastly broader discretion than the "unfettered discretion" conferred upon sentencing judges that Congress sought to eliminate by a more determinate sentencing process.

civil proceedings. It is clear that that "[t]he notion of punishment . . . cuts across the division between the civil and criminal law," *United States v. Halper*, 109 S. Ct. 1892, 1901 (1989), and therefore constitutional restraints on punishment are "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).

C. The Establishment of a Range of Penalties Is a Quintessentially Legislative Task That Is Necessary To the Fulfillment of Punishment's Theoretical Goals of Retribution and Deterrence

While the judiciary and legislature share responsibility for the development of the law of compensation for torts,¹⁴ legislatures customarily evaluate society's level of disapprobation for particular conduct by establishing the maximum and minimum punishments that may be imposed for specific offenses and trial courts exercise discretion to sentence within that range. See L. Berkson, *The Concept of Cruel and Unusual Punishment* 81-82 (1975); H.L.A. Hart, *Punishment and Responsibility* 15, 164 (1968); see generally J. Bentham, *The Rationale of Punishment* 411-12 (1830).¹⁵

¹⁴ Although not raised by this case, judicial creation of retroactive liability for punitive damages raises independent constitutional concerns. See note 7, *supra*.

¹⁵ Aside from punitive damage schemes, the only context in which punishment is still administered in our judicial system in the absence of established limits is in connection with the courts' exercise of their inherent contempt power. In *Green v. United States*, 356 U.S. 165 (1958), the Court, while adhering to the historical rule that contempts of court could be tried without a jury, insisted on the "careful use and supervision" of this power

The legislature is inherently in a better position than courts or juries to make the broad, multifaceted political, social, and economic policy judgments necessary to determine the desirable range of punishment for particular misconduct. While a court "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," a legislature "looks to the future and changes existing conditions by making a new rule to be applied thereafter" *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); see also *Weaver v. Graham*, 450 U.S. 24, 29 n.10 (1981) (the legislature is confined to "penal decisions with prospective effect and the judiciary and executive to applications of existing penal law"). As the Court observed in *Gore v. United*

and sustained a three-year sentence for willful disobedience of a surrender order as not being excessive because it was "well within" the maximum sentence under the federal criminal statute that punished the closely analogous crime of bail-jumping. Concern for the open-ended nature of the punishments available in contempt situations in those jurisdictions in which no legislatively imposed limits existed ultimately led the Court to interpose a jury in serious contempts, *Bloom v. Illinois*, 391 U.S. 194 (1968), and to impose various other procedural restrictions on the exercise of the criminal contempt power, e.g., *Taylor v. Hayes*, 418 U.S. 488 (1974). That power is, of course, exercised only sparingly and only under an elaborate set of constitutional constraints fashioned by this Court under the Due Process Clauses of the Fifth and Fourteenth Amendments. Whatever may be said for its continued exercise in the absence of legislatively established limits on punishments, the historic concerns that have moved this Court to tolerate its existence are not present in the punitive damage system. Cf. *Hicks v. Feiock*, 485 U.S. 624, 647 (1988) (O'Connor, J., dissenting) ("Because the compensatory purpose limits the amount of the fines, the contemnor is not exposed to a risk of punitive sanctions that would make criminal protections necessary.").

States, 357 U.S. 386, 393 (1958), "views . . . regarding severity of punishment . . . are peculiarly questions of legislative policy. . . ." *Accord Rummel v. Estelle*, 445 U.S. 263, 283 n.27 (1980) (determining the "seriousness" of an offense in the first instance is a question of legislative policy); *Rosenberg v. United States*, 346 U.S. 273, 306 (1953) (Frankfurter, J., dissenting) ("Congress not the whim of the prosecutor fixes the sentence").

Moreover, proper fulfillment of the penal objectives of retribution and deterrence, factors that the Court has deemed relevant in determining whether a punishment comports with the Constitution,¹⁶ implicitly mandates a legislatively established maximum punishment for a specific offense. For example, the unlimited character of punitive damages may chill desirable conduct and thereby risk overdeterrence. See, e.g., *Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979); *Browning-Ferris*, 109 S. Ct., at 2924 (O'Connor, J., concurring and dissenting); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749,

¹⁶ Applying the Eighth Amendment in *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion), quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the Court held that the imposition of the death penalty for offenses committed by persons under 16 years of age was unconstitutional as it did not serve the retributive and deterrent objectives of punishment and was therefore "nothing more than the needless imposition of pain and suffering." Whether the punitive damage system serves or undermines the objectives of punishment is similarly pertinent in evaluating the constitutionality of that system under the Due Process Clause of the Fourteenth Amendment. Cf. *Browning-Ferris*, 109 S. Ct., at 2921 n.23 (suggesting that "the due process analysis of an award of punitive damages may track closely the Eighth Amendment analysis" urged by petitioners).

779 (1985) (Brennan, J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 84 (1971) (Marshall, J., dissenting). If, however, the legislature establishes a maximum punishment, some measure of predictability—at least at the outer extreme—is created. Predictability has been considered a necessary condition for punishment to achieve its goal of measured deterrence. See J. Bentham, *The Rationale of Punishment*, at 41; see 4 W. Blackstone, *Commentaries on the Laws of England* 16-17 (13th ed. 1800). Indeed, as Blackstone observed, "it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offenses." *Id.*, at 12.

Bentham's utilitarian theory of punishment recognizes that it is the legislature's task to prescribe a range of permissible punishments for a specific offense. Positing that the goal of deterrence requires the punishment to be proportional to the guilt of the offender, Bentham set out six primary rules to guide legislators in demarking the maximum and minimum limits of punishment. Four of those rules mark the limits of punishment on the minimum side,¹⁷ and the

¹⁷ These four rules provide:

Rule 1. "The the value of punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offense . . ."

Rule 2. "The greater the mischief of the offense, the greater is the expense which it may be worth while to be at, in the way of punishment . . ."

Rule 3. "Where two offenses come in competition, the pun-

other two rules aid in establishing maximum limits.¹⁸ J. Bentham, *An Introduction to the Principles of Morals and Legislation* 289-93 (C. Wilson & R. McCallum ed. 1945); see J. Bentham, *The Rationale of Punishment*, at 32-37; E. Pincoffs, *The Rationale of Legal Punishment* 23-24 (1966).

The fulfillment of the objectives of punishment has been achieved in our legal system by a complex balancing of the goals of retribution and deterrence within a framework that ensures that punishment is neither disproportionate nor excessive, a task for which an ephemeral jury, convened to consider a single isolated case, is singularly unsuited and ill-equipped. As Justice Brennan has noted, the principle

ishment for the greater offense must be sufficient to induce a man to prefer the less"

Rule 4. "The punishment should be adjusted in such manner to each particular offense, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it"

J. Bentham, *An Introduction to the Principles of Morals and Legislation* 289-93 (C. Wilson & R. McCallum ed. 1945).

¹⁸ These two rules provide:

Rule 5. "The punishment ought in no case be more than what is necessary to bring it into conformity with the rules here given [marking the limits of punishment on the minimum side]"

Rule 6. "[T]he quantity actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always be taken into account."

J. Bentham, note 17, *supra*, at 289-93. While Rule 6 is intended to serve as a guide to the legislator, its principal purpose is to guide the judge in conforming to the intentions of the legislature. *Id.*

of proportionality is a necessary component of our justice system because the retributive and deterrent purposes that justify punishment themselves "possess inadequate self-limiting principles." *Tison v. Arizona*, 481 U.S. 137, 180 (1987) (dissenting opinion).

The concept of proportionality requires that punishment be consonant with society's judgment regarding the seriousness of the offense. There must therefore be limits on punishment for each offense lest the punishment for that offense in a particular case be more severe than that which society reserves for more serious offenses. Unless it is provided with sufficient legislative guidance, a jury plainly cannot perform that function. S. Benn, *Punishment*, 7 *Encyclopedia of Philosophy* 32 (1967) (retributive justice demands that the punishment "fit the crime"); J. Bentham, *The Rationale of Punishment*, at 32-37 (deterrence will be accomplished only by scaling the expense of punishment to the mischief of the offense); L. Berkson, at 66-69; H. Dagge, *Consideration on Criminal Law* 167-71 (1772); H.L.A. Hart, at 25 ("the guiding principle is that of proportion within a system of penalties between those imposed for different offenses where these have a distinct place in a common sense scale of gravity"); W. Paley, *The Principles of Moral and Political Philosophy* 372-74 (6th ed. London 1788); E. Pincoffs, at 3-5, 23-24; E. van der Haag, *Punishing Criminals* 237 (1975).¹⁹

¹⁹ As Blackstone observed, ideally a

scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least; but if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions.

In punitive damage cases, unguided juries, like bolts of lightning, wreak retribution on individual wrongdoers in amounts determined primarily by instinct, passion and the chemistry of a particular, wholly unique case. Juries typically assess punitive damages without any special training, expertise or instruction regarding what measure of punishment is necessary to achieve retribution and deterrence in society as a whole or any informed sense of what society as an institution has determined to be suitable punishments for the same, similar, or more or less serious misconduct. Remarkably, juries in punitive damage cases are asked to perform this complex task in the absence of any legislative guidance.

To say that the punitive damage system is not well-conceived or designed to produce consistent results that fulfill society's retributive and deterrent goals is an understatement. Parties who seek punitive damages are private prosecutors whose exclusive objectives are to collect as large a bounty as they can convince juries to impose. The punitive damage system then turns over to the factfinder responsibility for determining the amount of the bounty, often based largely on the wealth of the defendant and almost always based on the degree of hostility that the prosecutor has been able to inspire toward the defendant. The chemistry of combining these two functions is calculated to produce results that bear no visible relationship to the public purposes of punitive awards. See Morris, *Punitive Damages in Tort Cases*, 44 Harv.

and not assign penalties of the first degree to offenses of an inferior rank.

4 W. Blackstone, at 17-18.

L. Rev., at 1179 ("Evaluation of past conduct [at the liability stage of a trial] is a different type of problem from control of future behavior [P]roblems of social control may require more technical skill than jurymen have or can acquire."). This open incitement to the infliction of severe punishment against a defendant with a deep pocket is built into much of today's punitive damage system.

Because the punitive damage system provides wholly inadequate notice of the standards against which liability will be measured, and the punitive consequences for deviation from those standards, the goals of retribution and deterrence that provide the only justification for the system cannot be served. Without sufficient standards to guide their policy-making, juries and judges exercising vast discretion to punish do so by legislating and executing their own theories of retribution and deterrence for each particular case. See *Reserve Life*, 894 F.2d, at 1421 (Jones, J.) ("the rubrics of punishment [and] deterrence . . . are simply too uncertain to yield consistent results"). Once a jury has acted, trial and appellate judges—as ill-suited²⁰ as juries to make the kind of political, social and economic judgments that ought to go into the development of any fair and efficient system of punishment—make no systematic attempt to bring order and consistency to this system, even assuming they could do so by substituting their own *ad hoc* judgments for those of the juries.²¹

²⁰ In the absence of legislative standards, even a conscientious trial judge is bereft of meaningful moorings when determining the amount of appropriate punishment. See, e.g., *Reserve Life*, 894 F.2d, at 1421 (Jones, J.).

²¹ This judicial abstinence is often based upon the assumption

Under this "system," each punitive damage case becomes a laboratory for social engineering in which the jury formulates and applies its own unique theory of punishment and deterrence and then disbands. The existing punitive damage regime carries with it no pretense of trying to achieve coherent, rational results. Instead, it is unavoidable that it will produce bizarre and unpredictable results because there are no overarching rules to govern its operation. See *Reserve Life*, 894 F. 2d, at 1421 (Jones, J.) ("The judicial hands-off policy on punitive damages assures that no unifying principle can or will emerge from the penalties inflicted . . .").

D. The Due Process Clause Requires Legislatively Established Limits on the Maximum Punitive Damage Award Permissible for a Particular Type of Misconduct

The Due Process Clause of the Fourteenth Amendment requires that persons who are subjected to punishment be informed in advance at least of the range of punishments available under the law for any particular conduct. This Court has observed, in the context of punishment imposed in criminal proceedings,

that plaintiffs are constitutionally entitled to have a jury assess the amount of damages in cases in which the Constitution otherwise guarantees a jury trial on the issue of liability. This assumption, while never wholly tenable, is now clearly misdirected in light of this Court's recent decision in *Tull v. United States*, 481 U.S. 412 (1987). Thus, the courts have left to juries the *ad hoc* determinations of retribution and deterrence, and during this process, the one political institution in our system capable of treating the social, political and economic issues involved in determining the appropriate scale of punishments—the legislature—has abstained from establishing the necessary foundation for this aberrational and mischievous system.

that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979). In the criminal justice system, due process therefore requires that the "range of penalties" be established in advance so as to "inform[] . . . the courts, prosecutors, and defendants of the permissible punishment alternatives available" *Id.*, at 126. Indeed, it is a basic principle of our criminal law that the government can prosecute a person only under a criminal statute that "fairly and clearly define[s] the conduct made criminal and the punishment which can be administered." *Berra v. United States*, 351 U.S. 131, 139-40 (1956) (Black, J., dissenting).²²

In *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912), this Court held that a \$50,000 "fine" imposed against a corporation under a "quo warranto" statute did not violate the Due Process Clause despite the absence of any statute "fixing the maximum penalty . . . and no rule for measuring damages" *Id.*, at 285. In addressing the argument that the lack of a statutory maximum penalty violated due process, the Court did not discuss the fair notice component of the Due Process Clause. Rather, the Court assumed that the "real objection is not so much to the exist-

²² The due process requirement that a "person of ordinary intelligence" have fair notice as to what the law commands or forbids is equally applicable in civil proceedings. *A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) ("It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."). See generally *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

ence of the power to fix the amount of the fine as the fact that when exercised by the Supreme Court of the State, it is not subject to review, and is said to be unlimited." *Id.*, at 286.

The Court rejected this objection on the grounds that the power to fix punishment "is limited . . . by the obligation to administer justice and to no more assess excessive damages than to impose excessive fines." *Id.* (citation omitted). The Court cited for this proposition *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), in which it had expressed the view that civil fines and damages imposed by a State violate the federal constitution if they "are so grossly excessive as to amount to a deprivation of property without due process of law." This essentially substantive due process analysis slides by the fundamental procedural objection to the imposition of punitive damages in the complete absence of statutory limits.

As the many punitive damages cases that have come to this Court in recent years amply demonstrate, post-judgment review of punitive damage awards is manifestly inadequate to protect against the infliction of arbitrary and excessive monetary punishments in the absence of a statutory range of penalties. Moreover, judicial review to determine whether a particular punitive damage verdict is excessive or disproportionate after the fact is not likely to cure the threshold flaw of the punitive damage system—the lack of *advance* notice of the amount of punishment that can be inflicted.

As Justice Marshall has observed, "[u]nlike criminal penalties, . . . punitive damages are not awarded within discernible limits but can be awarded in almost any amount [T]hese damages are the direct prod-

uct of the ancient theory of unlimited jury discretion The manner in which unlimited discretion may be exercised is plainly unpredictable." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting); see, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (1984) (Powell, J., dissenting). "[A]lmost from the outset," *Miller v. Florida*, 482 U.S., at 430, this Court recognized that the Ex Post Facto Clause, Art. I, § 10, Cl. 1, is concerned with "the lack of fair notice" when a State "creat[es]" or "increas[es]" a penalty "after the fact." *Weaver v. Graham*, 450 U.S. 24, 28 & n.9 (1981); *Miller*, 482 U.S., at 430; *Calder v. Bull*, 3 Dall., at 397 (Paterson, J.) ("the enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty" after the conduct at issue has occurred). If a state legislature is barred by the Ex Post Facto Clause from creating a new penalty "after the fact," "it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result" through a common law punishment scheme. See *Bowie v. City of Columbia*, 378 U.S. 347, 354 (1964).

CONCLUSION

In order to cause conduct within its borders to conform to ill-defined and unlimiting standards, the State of Alabama has authorized *ad hoc* civil juries to inflict punishment in whatever amount may satisfy a particular jury's concept of retribution and deterrence in a particular case. Those potentially subject to the consequences of this system cannot ascertain in advance the precise nature of the conduct that is prohibited or the level of punishment that will be

inflicted for particular antisocial acts. Such an unpredictable, bizarre, capricious and destructive system is the very antithesis of the due process guaranteed by the Fourteenth Amendment.

June 1, 1990

Respectfully submitted,

Of Counsel:

ARTHUR A. PALMUNEN
AETNA LIFE INSURANCE
COMPANY
151 Farmington Avenue
Hartford, Connecticut 06156

JOHN B. REINIERS
ALLSTATE INSURANCE
COMPANY
Allstate Plaza, Bldg. 7
Northbrook, Illinois 60062

ROBERT R. SHEEHAN
BANKERS LIFE AND CASUALTY
COMPANY
4444 West Lawrence Avenue
Chicago, Illinois 60630

JOHN H. REHM, JR.
THE OHIO CASUALTY
INSURANCE COMPANY
136 North Third Street
Hamilton, Ohio 45025

GEORGE R. KATOSIC
RESERVE LIFE INSURANCE
COMPANY
P.O. Box 660254
Dallas, Texas 75266

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Amici Curiae

**Counsel of Record*

Of Counsel:

THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

APPENDIX

APPENDIX

At the time of ratification of the Fourteenth Amendment, most States had enacted comprehensive codifications describing the conduct which could be subjected to punishment and the maximum punishment that could be administered. *See* Ark. Stat. ch. 42 (1874) (general codification of crimes); *see id.* at §§ 1357, 1364, 1381, 1386, 1388 (imposing maximum fines for a variety of offenses); *see* Cal. Stat. ch. 99 (1850) (general codification of crimes); *see id.* ch. 99 §§ 61, 63, 69, 86, 87; *see* Conn. Gen. Stat. tit. 12 (1866) (general codification of crimes); *see id.* §§ 90-92, 160-166, 180-181 (imposing maximum fines for a variety of offenses); *see* Del. Rev. Stat. chs. 126-133 (1852) (general codification of crimes); *see id.* ch. 128, §§ 3-6, 8-19, ch. 129, §§ 1-5 ch. 130, §§ 1-5, (imposing maximum fines for a variety of offenses); *see* Fla. Stat. chs. 42-56 (1872) (general codification of crimes); *see id.*, ch. 44 §§ 5, 9, 17, 18, 49, ch. 45 § 6, 8, 9; *see* Ga. Code §§ 4286-4336 (1861) (general codification of crimes); *see id.* §§ 4332, 4468, 4470, 4480, 4482 (imposing maximum fines for a variety of offenses); *see* Digest of the Crim. Laws of Ill. (1868) (general codification of crimes); *see id.* division 7 §§ 86, 91, 95, 100, division 8 § 119; *see* Ind. Stat. chs. 6-7 (1862) (general codification of crimes); *see id.* ch. 6 §§ 36, 37, 39, 43, 46; *see* Iowa Code tit. 24 (1873) (general codification of crimes); *see id.* ch. 3 §§ 3885-3886, 3889-3890, 3898 (imposing maximum fines for a variety of offenses); *see* Kan. Gen. Stat. ch. 31 (1876) (general codification of crimes); *see id.* ch. 31 §§ 80, 109, 113, 146 (imposing maximum fines for a variety of offenses); *see* Ky. Rev. Stat. Ann. ch. 28, arts. 1-26 (1867) (punishing full range of offenses, including

offenses against the person, forgery, larceny, embezzlement, and trespass); *see id.* ch. 28, art. 14 § 6, art. 15 §§ 4, 7, art. 16 §§ 2, 5, art. 17 §§ 1-2, 6-8, 10, 12-20, 22-25, art. 18 §§ 4-5, art. 19 §§ 1-3, art. 20 § 2, art. 21 §§ 1-5, art. 22 § 3, art. 23 §§ 1-3; art. 24 §§ 2, 5, art. 25 §§ 2-5, 7-10 (imposing maximum fines for a variety of offenses); *see* La. Rev. Stat. §§ 784-975 (1870) (general codification of crimes); *see id.* §§ 811, 815-819, 821-822, 824-826 (imposing maximum fines for a variety of offenses); *see* Me. Rev. Stat. chs. 117-139 (1871) (general codification of crimes); *see id.* ch. 120 §§ 1-4, 6, 8, ch. 121 §§ 3, 6 (imposing maximum fines for a variety of offenses); *see* Md. Code art. 30 (1860) (general codification of crimes); *see id.* art. 30 §§ 19-20, 34, 38; *see* Mass. Gen. Stat. chs. 161-164 (1860) (general codification of crimes); *see id.* ch. 161 §§ 43, 44, 46, 48, 54-56, 91 (imposing maximum fines for a variety of offenses); *see* Minn. Stat. ch. 54 (1873) (general codification of crimes); *see id.* tit. 4 §§ 82, 84, 87, 96-97, 102-103, 105 (imposing maximum fines for a variety of offenses); *see* Miss. Rev. Code ch. 58 (1871) (general codification of crimes); *see id.* §§ 2547, 2569, 2597, 2653, 2656-2657 (imposing maximum fines for a variety of offenses); *see* Mo. Stat. ch. 42 (1870) (general codification of crimes); *see id.* art. 3 §§ 27, 31, 59, 65-66, 68-69 (imposing maximum fines for a variety of offenses); *see* Nev. Laws ch. 54 (1873) (general codification of crimes); *see id.* §§ 2368-2369, 2379, 2386-2387 (imposing maximum fines for a variety of offenses); *see* N.H. Gen. Laws chs. 269-284 (1878) (general codification of crimes); *see id.* ch. 275 §§ 1-4, 7, 8, 10, 11 (imposing maximum fines for a variety of offenses); *see* N.Y. Stat., ch. 1, tits. 1-7 (1869) (general codification of crimes); *see id.* ch. 1, tit. 3 §§ 69, 71,

ch. 1, tit. 4 §§ 9-13 (imposing maximum fines for a variety of offenses); *see* N.C. Rev. Code. ch. 34 (1855) (general codification of crimes); *see id.* ch. 34 §§ 49, 65, 68-70, 83-88, 91-92 (imposing maximum fines for a variety of offenses); *see* Ohio Crim. Code (1878) (general codification of crimes); *see id.* ch. 3 §§ 6-7, 16, 20, 22 (imposing maximum fines for a variety of offenses); *see* Or. Stat. chs. 3-12 (1855) (general codification of crimes); *see id.* ch. 4 §§ 12-13, 16-17, 31-32, 34-40 (imposing maximum fines for a variety of offenses); *see* Pa. Rev. Penal Code (1860) (general codification of crimes); *see id.* §§ 100-106, 111-112, 119-121, 125-130, 134, 155-162, 164-165 (imposing maximum fines for a variety of offenses); *see* R.I. Stat. tit. 30 (1857) (general codification of crimes); *see id.* tit. 30, ch. 214 §§ 10, 14, 16-20, 22, 24-28 (imposing maximum fines for a variety of offenses); *see* S.C. Rev. Stat. tit. 2 (1894) (general codification of crimes); *see id.* §§ 276-282, 288-295 (imposing maximum fines for a variety of offenses); *see* Tex. Laws arts. 355-572 (1850) (general codification of crimes); *see id.* arts. 380-382, 386, 389, 391, 393 (imposing maximum fines for a variety of offenses); *see* Vt. Stat. tit. 38 (1851) (general codification of crimes); *see id.* ch. 104 §§ 2-10, 15, 19-22, 26-28 (imposing maximum fines for a variety of offenses); *see* Va. Code tit. 54 (1860) (general codification of crimes); *see id.* ch. 192 §§ 18, 24, 27, 30, 32; *see* W.Va. Code chs. 143-152 (1870) (general codification of crimes); *see id.* ch. 144 §§ 9-11, ch. 145 §§ 5-8, 23 (imposing maximum fines for a variety of offenses); *see* Wis. Stat. tit. 27 (1871) (general codification of crimes); *see id.* ch. 164 §§ 23, 29, 31-32, 38, 42, 45, ch. 165 §§ 16-18, 23 (imposing maximum fines for a variety of offenses).

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

—v.—

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HALGROVE,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

**BRIEF OF *AMICUS CURIAE*
CHURCH OF SCIENTOLOGY OF CALIFORNIA
IN SUPPORT OF PETITIONER**

ERIC M. LIEBERMAN

Counsel of Record

RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.

740 Broadway-Fifth Floor
New York, New York 10003
(212) 254-1111

MICHAEL LEE HERTZBERG

740 Broadway-Fifth Floor
New York, New York 10003
(212) 982-9870

*Counsel for Amicus Curiae
Church of Scientology
of California*

Dated: June 1, 1990

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

—v.—

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HALGROVE,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

**BRIEF OF *AMICUS CURIAE*
CHURCH OF SCIENTOLOGY OF CALIFORNIA
IN SUPPORT OF PETITIONER**

INTEREST OF THE *AMICUS CURIAE*¹

The Church of Scientology of California ("the Church") is a not-for-profit religious corporation incorporated in the State of California. The Church adheres to the practices and beliefs of the Scientology religion. The Church is the petitioner in a case that is currently pending before this Court,

¹ The letters of consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

Church of Scientology of California v. Wollersheim, No. 89-1361 (filed February 23, 1990). As set forth in detail in that petition, a California state court jury awarded the plaintiff, Larry Wollersheim, \$25 million in punitive damages and \$5 million in compensatory damages against the Church for intentional infliction of emotional distress purportedly caused by participation in the practices of the Scientology religion, particularly Scientology's central religious practice of auditing. The judgment was affirmed on appeal, although the court of appeal reduced the punitive damages to \$2 million and the compensatory damages to \$500,000.

The Church's petition before this Court challenges the judgment as contrary to the First Amendment. Of particular relevance here, the Church also asserts the punitive damage award violates both the First Amendment and the Fourteenth Amendment's due process clause. There is another petition pending before this Court that raises similar issues of intangible tort liability for religious practices, including First Amendment and due process challenges to a similar massive punitive damage award. *International Society For Krishna Consciousness of California v. George*, No. 89-1399 (filed February 28, 1990).

The Church understands that the Court did not act on either of these petitions during the regularly scheduled conferences, presumably because of the Court's prior decision to grant the petition for certiorari in the instant matter on the question of what restrictions, if any, the due process clause imposes on an award of punitive damages.

ARGUMENT

The Church files this *amicus curiae* brief because of its direct interest in the outcome of this matter. The Church is mindful, however, that numerous *amicus curiae* briefs have been filed in this case, and the Church does not wish to burden this Court with repetitious briefing. Therefore, the Church fully adopts and incorporates by reference the *amicus*

curiae briefs of CBS, Inc., *et al.*, and of the National Council of Churches of Christ in the U.S.A., *et al.*, particularly as these briefs discuss the role of the First Amendment and the due process clause in providing heightened protection from ruinous punitive damage awards for the free exercise of religion and freedom of speech. The Church also respectfully refers the Court to its discussion of these issues in its pending petition, at 26-29, and in its reply brief, at 6-7.

If the Court finds it unnecessary to address these important First Amendment issues in this case, the Church suggests that the *Wollersheim* case provides an appropriate vehicle for resolving the question of the limits imposed by the First Amendment and the due process clause upon the imposition of punitive (and compensatory) damages for intangible injuries purportedly sustained as a result of religious practices and religiously-motivated speech.

CONCLUSION

The Court should make clear, either in this case or in *Woltersheim*, that whatever limitations the due process clause imposes on punitive damages in commercial litigation, the First Amendment and the due process clause prohibit or severely restrict the award of punitive damages for intangible injuries allegedly suffered as a result of participation in religious practices or as a result of religiously-motivated speech.

Dated: June 1, 1990

Respectfully submitted,

ERIC M. LIEBERMAN
Counsel of Record
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway-Fifth Floor
New York, New York 10003
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway-Fifth Floor
New York, New York 10003
(212) 982-9870

*Counsel for Amicus Curiae
Church of Scientology
of California*

16
No. 89-1279

Supreme Court, U.S.
FILED
JUN 1 1990
JOSEPH F. SPANIOLO
CLERK

In The
Supreme Court of the United States
October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,
Respondents.

On Writ Of Certiorari To The
Supreme Court Of Alabama

BRIEF OF AMICI CURIAE BETHLEHEM
STEEL CORPORATION AND HERCULES
INCORPORATED IN SUPPORT OF PETITIONER

MARTIN S. KAUFMAN
Counsel of Record

Atlantic Legal Foundation
205 East 42nd Street, 9th Floor
New York, New York 10017
(212) 573-1960

Attorneys for Amici Curiae

QUESTION PRESENTED

Whether punitive damages awarded by a state court jury which has, and is told that it has, complete discretion as to whether to award punitive damages and the amount of punitive damages are sustainable under the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Question Presented	i
Interest of <i>Amici</i>	1
Summary of Argument	2
Argument	3
Point I— Alabama's Procedures For Imposing Punitive Damages Do Not Provide Due Process	5
A. Alabama's Punitive Damages Laws Are Unconstitutionally Vague	6
B. Alabama's Punitive Damages Rules Do Not Provide Adequate Notice of Penal Consequences	7
Conclusion	10

TABLE OF AUTHORITIES

	Page
CASES	
Federal	
<i>Bankers Life & Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988)	5
<i>Browning-Ferris Industries of Vermont v. Kelco Dis- posal, Inc.</i> , 492 U.S. ___, 109 S.Ct. 2909 (1989)	5
<i>City of Mesquite v. Aladdin's Castle, Inc.</i> , 455 U.S. 283 (1982)	6
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	5
<i>Coates v. City of Cincinnati</i> , 402 U.S. 611 (1971)	6
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	5
<i>Gertz v. Robert Welch, Inc.</i> 418 U.S. 323 (1974)	5
<i>Giacco v. Pennsylvania</i> , 382 U.S. 399 (1966)	6
<i>Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982)	6
<i>International Brotherhood of Electrical Workers v. Foust</i> , 442 U.S. 42 (1979)	5
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)	6, 7
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	8
<i>McGautha v. California</i> , 402 U.S. 183 (1971)	7
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	7
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974)	6
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979)	8

TABLE OF AUTHORITIES - Continued

Page

STATE

<i>City Bank of Alabama v. Eskridge</i> , 521 So.2d 931 (Ala. 1988)	4
<i>K-Mart v. Weston</i> , 530 So.2d 736 (Ala.1988)	4

No. 89-1279

In The

Supreme Court of the United States

October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of Alabama

BRIEF OF AMICI CURIAE BETHLEHEM
STEEL CORPORATION AND HERCULES
INCORPORATED IN SUPPORT OF PETITIONER

INTEREST OF AMICI

Bethlehem Steel Corporation and Hercules Incorporated, with the consent of the parties, file this brief as *amici curiae* in support of the petitioner.¹

¹ Pursuant to Rule 36, consent letters of the parties have been filed with the Clerk of the Court.

Bethlehem Steel Corporation is one of the largest domestic producers of steel and steel products. It is also engaged in mining and construction and repair of steel structures such as off-shore drilling platforms, and ships. Hercules Incorporated is a major manufacturer of chemicals, flavors, food ingredients and advanced materials, including rocket fuels. Both Bethlehem and Hercules are major corporations which are potentially exposed to claims for punitive damages in product liability and commercial law litigations. As such they have a direct interest in articulating for the Court the violation of defendants' due process rights when punitive damages are imposed by juries without clear guidance or precise limitations as to whether, when and to what degree punishment by way of punitive damages can be imposed.

SUMMARY OF ARGUMENT

In Alabama, once a defendant has been found to have committed an act for which punitive damages may be imposed juries are instructed that they have complete discretion to impose punitive damages, and that the amount of punitive damages is likewise in their discretion. While juries are told that the purpose of punitive damages is to punish and deter, the terms "punish" and "deter" are not defined, and no limits are placed by the Court on the degree to which the jury may deem it appropriate to impose punitive damages. Punitive damage verdicts are reduced or reversed only if they "shock" the "judicial conscience".

Punitive damages awarded by juries exercising such limitless discretion violate the Due Process Clause of the Fourteenth Amendment because they amount to the use of vague laws to punish.

Alabama in this case, and by example most other states, should be required to adopt standards for the imposition of punitive damages to provide constitutionally sufficient specificity, to prevent arbitrary and discriminatory punishment and to engender the predictability in legal relations that the law is supposed to foster.

ARGUMENT

I

ALABAMA'S PROCEDURES FOR IMPOSING PUNITIVE DAMAGES DO NOT PROVIDE DUE PROCESS

The procedures by which punitive damages are awarded in Alabama (and the punitive damages systems in most other states) fail to provide juries with standards to guide them in deciding whether punitive damages should be awarded and in determining the appropriate amount of punitive damages and lack objective criteria for judicial review of punitive damages verdicts. An Alabama jury has unlimited discretion to award or withhold punitive damages once it has decided that a defendant has committed an act that permits punitive damages. The judge provides no standard or guideline that informs the jury how it should exercise its discretion to award punitive damages. In this case, the jury was told simply that if

it found that a fraud had been perpetrated it could "in your discretion award what is known as punitive damages", and that the amount of money thus awarded "is to punish the defendant . . . [and] to make an example." (Reporter's Transcript at 895, 897-898)

Once the jury decides to award punitive damages, Alabama provides no standard to guide the jury in determining the amount of punitive damages to award. Although the court may tell the jury that punitive damages have the dual purpose of punishment and deterrence (see Reporter's Transcript at 898) no explanation is given of whether punishment and deterrence imply any quantitative limitation on punitive damages. Thus, the punitive damages awarded is potentially unlimited.

The Alabama Supreme Court has aptly described the lack of objective standards: "there is no legal measure of [punitive] damages" in Alabama. See *K-Mart v. Weston*, 530 So.2d 736, 740 (Ala. 1988). In Alabama, as elsewhere, punitive damages "need bear no relationship to actual damages, and their award is left largely to the discretion of the jury." *City Bank of Alabama v. Eskridge*, 521 So.2d 931, 933 (Ala. 1988).

In Alabama the amount or range of punitive damages is not specified or limited by legislation or by decisional law. No mathematical relationship, whether precise or general, between the degree of injury and the amount of punitive damages is even suggested. There is no requirement that the punishment imposed be proportional to the injury sustained or that it be commensurate with the punishment imposed in other cases involving similar acts or similar amounts of compensatory damages.

An essential purpose of the Due Process Clause is to prevent the arbitrary exercise of governmental power. See *Daniels v. Williams*, 474 U.S. 327 (1986). In diverse cases, many members of this Court have recognized that the boundless discretion of juries to award punitive damages frustrates that purpose, by allowing juries to punish unpopular views (see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)), or to punish unpopular individuals (see *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 n. 14 (1979)), or to punish certain defendants more severely than others because some defendants are viewed as having proverbial "deep pockets" (see *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981)).

More recently, in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 87-88 (1988) Justice O'Connor concurring, joined by Justice Scalia, and in *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, 492 U.S. ___, 109 S.Ct. 2909, 2923 (1989), Justice Brennan, joined by Justice Marshall, noted the Due Process Clause implications of punitive damages awarded by juries which are guided "by little more than an admonition to do what they think is best." 109 S.Ct. at 2923.

"[W]holly standardless discretion to determine the severity of punishment", as Justice O'Connor characterized the current system of punitive damages (*Bankers Life*, 486 U.S. at 88), implicates both the "void for vagueness" and the "notice" aspects of Due Process.

A. Alabama's Punitive Damages Laws Are Unconstitutionally Vague.

The "void for vagueness" doctrine requires that laws (whether they be penal, quasi-penal or regulatory²) be defined "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) [criminal statute]; *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) and *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982) [municipal licensing ordinances]; *Robert v. United States Jaycees*, 468 U.S. 609 (1984) [civil action to enforce state human rights statute]. The purpose of the doctrine is to inhibit arbitrary and capricious enforcement of the law, see *Kolender*, 461 U.S. at 357-58, and *Smith v. Goguen*, 415 U.S. 566, 574 (1974) and to "reduce the danger of caprice and discrimination in the administration of the laws" *Roberts*, 468 U.S. at 629.

In *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) this Court held it unconstitutional to enact or enforce a law "whose violation may entirely depend on whether or not [the law enforcement officer] is annoyed." In Alabama, as elsewhere, a jury may impose punishment in the form of punitive damages of huge proportions merely because it is "annoyed" that plaintiff was injured by a corporate Goliath.

² In this regard, there is no significant distinction between "civil" punitive damages and "criminal" punishment. See *Giacco v. Pennsylvania*, 382 U.S. 399, 402 (1966).

Indeed, it is a misnomer to call the act of an Alabama jury in awarding punitive damages an "exercise of discretion", for "discretion" is "judgment guided by reason and kept within bounds." *McGautha v. California*, 402 U.S. 183, 285 (1971) (Brennan, Douglas and Marshall, JJ., dissenting). The jury in this case, and in others like it where the jury is given no guidance, and has no bounds, may be acting merely on caprice.

By telling juries that in deciding whether to award punitive damages and in determining the amount of punitive damages they should "do what they think is best", as Justice Brennan so concisely put it, the punitive damages system not only fails to deter arbitrary and discriminatory punishment, it openly invites caprice, prejudice, discrimination and widely divergent punishment for the same act.

B. Alabama's Punitive Damages Rules Do Not Provide Adequate Notice of Penal Consequences.

The Due Process Clause also requires that statutes provide "actual notice" to the subjects of law as to the consequences of their behavior. See *Kolender*, 461 U.S. at 357-58. Because there is no guidance, from statute or common law, as to when punitive damages will be awarded, or what amount of punitive damages (*i.e.* severity of punishment) may be imposed, it is beyond argument that the laws are so vague that persons of common intelligence can only guess at their meaning and will inevitably differ as to their applicability and application. See *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984).

Just as criminal statutes which "do not state with sufficient clarity the consequences of violating a given criminal statute" pose serious constitutional questions, *United States v. Batchelder*, 442 U.S. 114, 123 (1979), so punitive damages procedures which do not permit a defendant to know whether his conduct is punishable or the boundaries of his potential liability for particular conduct violate the Due Process Clause.

The current punitive damages scheme warrants review and revision under the criteria articulated by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): The private interest that will be affected is the possible loss of huge amounts of property. The risk to citizens is the possibility of erroneous deprivation of such interest through the inadequate procedures now used. The probable value of additional or substitute procedural safeguards is the enhanced predictability and regularity of the law. The government's interest that would be affected by the additional or different safeguards is the benefits it would derive from the more regular and predictable administration of justice and the diminishment of private windfalls that exceed the appropriate bounds of punishment and deterrence.

The unfettered discretion now allowed juries must be replaced with clear standards which will survive scrutiny under the standards for procedural safeguards required by the Due Process Clause. The huge punitive damage awards that have become increasingly common demonstrate the significance of the private interest affected and the risk of deprivation. The value of limiting the currently unbounded whim and caprice of juries is clear: it will introduce elements of predictability and balance to

the legal structure. The impact on the governmental interest will be beneficial, for a constitutionally acceptable punitive damages system will correlate civil penalties with criminal penalties, will discourage private windfalls, and will encourage non-judicial resolution of claims.

Legislatures should be required to establish objective criteria for the imposition of punitive damages and limits on the size of such awards to reduce the likelihood of arbitrary, capricious or discriminatory jury awards which exceed any rational basis either as deterrence or measured punishment. Such is, after all, the business of legislatures: they routinely enact laws that penalize criminal, quasi-criminal and merely negligent behavior by fixing fines, both criminal and civil.

At a minimum, juries must be clearly instructed (as the jury in this case was not) that they may not allow anger, prejudice or other emotion to influence their consideration of awarding punitive damages. They must be told that a defendant's unpopularity, race, residence, corporate form, or other characteristic of personal or legal status are not factors they may consider. Juries must not be told they have complete discretion, but instead should be told that the amount of punitive damages must be carefully tailored to the purpose of deterrence. Juries should be given information about the penalties imposed by statute for analogous acts.



CONCLUSION

The unfettered power of the Alabama jury to impose punitive damages does not comport with the Due Process Clause, and the judgment of the Alabama Supreme Court must be reversed.

June 1, 1990

Respectfully submitted,

MARTIN S. KAUFMAN
Counsel of Record

Atlantic Legal Foundation
205 East 42nd Street, 9th Floor
New York, New York 10017
(212) 573-1960

*Attorneys for Amici Curiae
Bethlehem Steel Corporation
and Hercules Incorporated*

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner

v.

CLEOPATRA HASLIP, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL
OF CHURCHES OF CHRIST IN THE U.S.A., THE
NATIONAL ASSOCIATION OF EVANGELICALS,
THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL
RIGHTS, THE CHRISTIAN LEGAL SOCIETY, THE
COALITION FOR RELIGIOUS FREEDOM, THE COUNCIL
ON RELIGIOUS FREEDOM, AND THE UNITARIAN
UNIVERSALIST ASSOCIATION, AS AMICI CURIAE
IN SUPPORT OF THE PETITIONER

MICHAEL J. WOODRUFF
Counsel of Record
Center for Law and
Religious Freedom
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
(703) 642-1070

FOREST D. MONTGOMERY
General Counsel
National Association of
Evangelicals
1023 Fifteenth St., N.W.
Suite 500
Washington, D.C. 20005
Attorneys for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF AMICI CURIAE	1
ARGUMENT	3
I. THE FIRST AMENDMENT PROVIDES AN INDEPENDENT SOURCE OF CONSTITU- TIONAL RESTRAINTS ON THE IMPOSI- TION OF PUNITIVE DAMAGES FOR THE RELIGIOUSLY MOTIVATED ACTS OF CHURCH OFFICIALS	6
II. PROCEDURAL PROTECTIONS IN CASES INVOLVING FIRST AMENDMENT RIGHTS ARE SIMILAR TO, BUT MORE EXTENSIVE THAN, THOSE REQUIRED IN COMMER- CIAL CASES UNDER THE DUE PROCESS CLAUSE	12
III. THE REASONS FOR LIMITING JURY DIS- CRETION TO AWARD PUNITIVE DAMAGES ALSO APPLY TO SO-CALLED "COMPENSA- TORY" DAMAGES FOR INTANGIBLE EMO- TIONAL HARMS	15
CONCLUSION	17
APPENDIX A (Particular Statements of Interest of the Amici)	1a

2

TABLE OF AUTHORITIES

Cases cited:	Page
<i>Bowen v. Roy</i> , 476 U.S. 693 (1986)	7
<i>Browning-Ferris Industries v. Kelco Disposal, Inc.</i> , 109 S.Ct. 2909 (1989)	4
<i>Chicago Teachers' Union v. Hudson</i> , 475 U.S. 292 (1986)	12
<i>Christofferson v. Church of Scientology</i> , No. A770405184 (Multnomah Cty. 1985)	5
<i>Church of Scientology v. Wollersheim</i> , 260 Cal. Rptr. 331 (Cal. App. 1989), cert. pending, No. 89-1361	3, 4, 5, 14, 16
<i>Church Universal & Triumphant, Inc. v. Witt</i> , No. B021187 (Cal. App. Apr. 10, 1989), cert. denied, No. 89-672 (1990)	5
<i>Employment Division, Dept. of Human Resources of Oregon v. Smith</i> , 494 U.S. —, 110 S.Ct. 1595 (Apr. 17, 1990)	8
<i>Fowler v. Rhode Island</i> , 345 U.S. 67 (1953)	13
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974) ..	4, 6, 7, 9, 12, 13
<i>Gregory v. Chicago</i> , 394 U.S. 111 (1969)	10
<i>Guinn v. Church of Christ of Collinsville</i> , 755 P.2d 766 (Okla. 1989)	5
<i>Hustler Magazine v. Falwell</i> , 485 U.S. 46 (1988)	12, 13, 17
<i>Hynes v. Mayor of Oradell</i> , 425 U.S. 610 (1976)	10
<i>Int. Brotherhood of Elect. Workers v. Foust</i> , 442 U.S. 42 (1979)	12, 13
<i>Int. Society for Krishna Consciousness v. George</i> , 213 Cal. App. 3d 729, 262 Cal. Rptr. 217 (1989), cert. pending, No. 89-1399	3, 4, 5, 8, 14, 16
<i>Jimmy Swaggart Ministries v. California State Board of Equalization</i> , 110 S.Ct. 688 (1990)	7
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)	12
<i>Lovell v. Griffin</i> , 303 U.S. 444 (1938)	11
<i>Lyng v. Northwest Indian Cemetery Protective Ass'n</i> , 485 U.S. 439 (1988)	7, 8
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	3, 10
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	10

TABLE OF AUTHORITIES—Continued

	Page
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964) ..	3
<i>Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	9, 12
<i>O'Neil v. Schuckardt</i> , 733 P.2d 693 (Idaho 1986)	5, 14
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	7, 8
<i>Thomas v. Review Bd.</i> , 450 U.S. 707 (1981)	8
<i>Tony and Susan Alamo Foundation v. Secretary of Labor</i> , 471 U.S. 290 (1985)	7
<i>United States v. Lee</i> , 455 U.S. 252 (1982)	7
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	8
Other Authorities:	
E. Gaffney and P. Sorensen, <i>Ascending Liability in Religious and Other Nonprofit Organizations</i> (1984)	10
G. Myers, <i>History of Bigotry in the United States</i> (H. Christman ed. 1960)	14
<i>The Williamsburg Charter Survey on Religion and Public Life</i> , 7 J. L. & Relig. — (1990)	14

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner

v.

CLEOPATRA HASLIP, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of Alabama

**BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL
OF CHURCHES OF CHRIST IN THE U.S.A., THE
NATIONAL ASSOCIATION OF EVANGELICALS,
THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL
RIGHTS, THE CHRISTIAN LEGAL SOCIETY, THE
COALITION FOR RELIGIOUS FREEDOM, THE COUNCIL
ON RELIGIOUS FREEDOM, AND THE UNITARIAN
UNIVERSALIST ASSOCIATION, AS AMICI CURIAE
IN SUPPORT OF THE PETITIONER**

INTERESTS OF AMICI CURIAE

The purpose of this brief is to emphasize that standardless imposition of punitive and other noncompensatory damages by civil juries presents a threat to constitutional liberties beyond those immediately involved in this case. In a series of recent cases, vulnerable minority religious groups and congregations have been ordered to pay millions of dollars in damages to former members and their families for emotional injuries allegedly sus-

tained as a result of their participation in the religion. As a practical matter, no more serious danger to religious freedom exists than the power of juries to punish religious groups for practices that seem to them outlandish, unfair, distasteful, threatening, or outrageous.

As the Court considers what limitations the Due Process Clause places on punitive damages in the context of commercial litigation, it should also be aware: (1) that the First Amendment provides an independent source of constitutional restraints on the imposition of punitive damages for the religiously motivated acts of church officials; (2) that First Amendment protections can and should take the form of procedural limits on jury discretion akin to, but more extensive than, those required under the Due Process Clause; and (3) that the constitutional rationale for restraints on punitive damages applies as well to supposedly "compensatory" damages for purely emotional injuries allegedly sustained as a result of participation in religious activities by the plaintiff or by a member of the plaintiff's family. For the reasons set forth in this brief, amici urge the Court to give guidance to the lower courts on these matters in its disposition of this case.

The filing of this brief does not imply that the amici agree with the doctrines and practices of any particular religious organization against which large punitive damages have been awarded. We do, however, defend their right to embrace religious beliefs and practices freely and without undue governmental restraint. Amici are guided by a golden rule in matters of religious freedom, desiring for others the same freedoms they wish to enjoy themselves. In the words of the Williamsburg Charter, a bicentennial document celebrating religious liberty, "Rights are best guarded and responsibilities best exercised when each person and group guards for all others those rights they wish guarded for themselves."

The written permission of the counsel of record for the petitioner and of the counsel of record for the re-

spondent to file this brief are on file with the Clerk. The particular statements of interest of the amici are included in Appendix A.

ARGUMENT

Exorbitant punitive damages are not confined to deep pockets. Nor do they affect only commercial interests. Increasingly, they are a weapon in the age-old struggle to harass or suppress unconventional or unpopular religious movements. This Court is familiar with the way in which tort suits were used in an attempt to cripple the civil rights movement. *NAACP v. Claiborne Hardware Co.*, 485 U.S. 886 (1982); *New York Times v. Sullivan*, 376 U.S. 254 (1964). The presence of social animus against civil rights activities or the press did not deter the Court from recognizing the careful legal regard which a defendant must be accorded because of First Amendment considerations. Amici believe this same regard should now be shown for religious bodies as well.

Indeed, the Court is currently holding two such cases pending resolution of this case. In *International Society for Krishna Consciousness v. George*, cert. pending, No. 89-1399 (filed Feb. 28, 1990), a jury awarded over \$29 million in punitive damages for emotional injuries allegedly suffered by a former member and her parents when she ran away from home, joined the Hare Krishna religion, and successfully evaded her parents for about a year. In *Church of Scientology v. Wollersheim*, cert. pending, No. 89-1361 (filed Feb. 23, 1990), a jury awarded over \$25 million in punitive damages for emotional distress allegedly suffered as a result of participation in auditing, Scientology's central religious practice. In both cases, the juries were instructed, in accordance with standard California jury instructions BAJI 14.71, that "[t]he law provides no fixed standard" for an

award of punitive damages. The juries were given three factors to consider, without further explanation: (1) the reprehensibility of the conduct of the defendant; (2) the amount of punitive damages that will have a deterrent effect on the defendant; and (3) the reasonableness of the relationship between the punitive damages and the actual damages. As Justice Brennan remarked of a similar jury instruction, this is "scarcely better than no guidance at all." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2923 (1989) (Brennan, J., dissenting). Or as Justice Powell put it, "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Even the trial court in *George* commented that it "believes that the jury lacked some guidelines upon which to predicate its award of punitive damages." Pet. App. 86a in No. 89-1399.

While in both cases the trial or appellate courts reduced the award on state law grounds (in *George*, finding that the principal ground for liability was baseless and unconstitutional), the courts affirmed punitive damage awards of \$2,500,000 in *George* and \$2,000,000 in *Wollersheim*, in addition to sizable compensatory damages.¹ In neither case did the courts recognize any due

¹ The jury in *George* awarded \$1.5 million in compensatory damages to Robin George for false imprisonment, \$75,000 for the wrongful death of her father, \$250,000 for intentional infliction of emotional distress, and \$2,500 for libel. Her mother, Marcia George, was awarded \$10,000 for libel and \$1.5 million for intentional infliction of emotional distress. The awards to Robin were not reduced on remittitur; the awards to Marcia were reduced on remittitur to \$410,000. The court of appeal dismissed all of the claims of Robin except the claim for wrongful death, and did not reduce any of the awards of compensatory damages to Marcia George. The jury in *Wollersheim* awarded \$5 million in compensatory dam-

process or First Amendment protections against the standardless imposition of punitive damages by the jury. In *George*, the court of appeals acknowledged "that standardless discretion in the award of punitive damages may implicate constitutional concerns," but chose to await "further action" by this Court. 213 Cal. App. 3d 729, 262 Cal. Rptr. 217, 257 & n. 52 (1989). In *Wollersheim*, the state courts simply ignored the constitutional challenges to the award of punitive damages.² In neither case did the reviewing courts articulate or follow any objective standards in setting what they deemed to be an appropriate level of punitive damages. These cases therefore demonstrate the need for this Court's guidance on the constitutional limitations on the imposition of punitive damages.³

As this Court considers the due process issues in this case, amici ask that it be aware of the wider implications of punitive damages litigation for the most precious of our constitutional liberties. It is important to signal

ages for intentional infliction of emotional distress. The trial court declined to reduce the award by a "single penny." The court of appeal reduced the compensatory damages to \$500,000.

² In *Wollersheim* the trial court refused to give a statutorily mandated jury instruction that punitive damages may be assessed against a corporation only when an officer, director, or managing agent directs or ratifies the underlying acts of agents or employees of the corporation. Cal. Civ. Code 3294 (b). By ignoring this legislative mandate, the appellate courts have exacerbated the problem of unfettered discretion by extending it to the trial judge as well as the jury.

³ Other cases in which juries have awarded mammoth punitive and compensatory damages for alleged emotional torts by religious bodies include *Church Universal & Triumphant, Inc. v. Witt*, No. B021187 (Cal. App. Apr. 10, 1989), cert. denied, No. 89-672 (\$1.5 million); *Guinn v. Church of Christ of Collinsville*, 755 P.2d 766 (Okla. 1989) (\$390,000); *O'Neil v. Schuckardt*, 733 P.2d 693 (Idaho 1986) (\$1 million); and *Christofferson v. Church of Scientology*, No. A770405184 (Multnomah Cty. 1985) (\$39 million, overturned on motion for mistrial).

to the lower courts that whatever the due process rights of commercial corporations, the rights of religious bodies or other First Amendment defendants demand strict procedural safeguards.⁴ In particular, the Court should note: (1) that the First Amendment provides an independent source of constitutional restraints on the imposition of punitive damages for the religiously motivated speech and acts of church officials; (2) that First Amendment protections can and should take the form of procedural limits on jury discretion akin to, but more extensive than, those required under the Due Process Clause; and (3) that the constitutional rationale for restraints on punitive damages apply as well to supposedly "compensatory" damages for purely emotional injuries allegedly sustained as a result of participation in religious activities by the plaintiff or by a member of the plaintiff's family.

I. THE FIRST AMENDMENT PROVIDES AN INDEPENDENT SOURCE OF CONSTITUTIONAL RESTRAINTS ON THE IMPOSITION OF PUNITIVE DAMAGES FOR THE RELIGIOUSLY MOTIVATED ACTS OF CHURCH OFFICIALS

This Court has held that the First Amendment limits the power of juries to impose punitive damages in defamation cases. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-350 (1974), the Court held that punitive damages

⁴ Several broadcasters and other media organizations have filed a brief amicus curiae in this case. In the interest of avoiding duplicative briefing, the religious organizations filing this brief wish to associate themselves with the argument in the media brief that "the first amendment requires the highest standards of due process" and that "standardless and deferential appellate review of punitive damage awards" in a first amendment setting "fails to satisfy [the] heightened due process standards required by the first amendment." See Part III of Brief Amicus Curiae of CBS, Inc., et al., in support of the Petitioner. The arguments set forth in the media brief are fully applicable in the free exercise context, particularly where the religious beliefs and practices involve protected speech.

may not be awarded in a private defamation case unless the plaintiff has proven actual malice (in the *New York Times* sense) by clear and convincing evidence. In so holding, the Court observed that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expression of unpopular views." *Id.* at 350.

Just as the Court recognized that punitive damages can violate the freedom of the press in *Gertz*, it should now recognize that punitive damages can violate the free exercise of religion. The imposition of punitive damages against a religious body meets the threshold test in free exercise cases, for the imposition of punitive damages in amounts as vast as recent juries have been awarding against religious bodies surely constitutes a "significant burden" on the autonomy and integrity of that religious body. See, e.g., *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 (1985); *United States v. Lee*, 455 U.S. 252, 256-257 (1982); *Sherbert v. Verner*, 374 U.S. 398 (1963).

This practice presents a far graver burden on free exercise than any of the cases this Court has recently considered. Unlike the sales and use tax imposed on the distribution of religious literature in *Jimmy Swaggart Ministries v. California State Board of Equalization*, 110 S.Ct. 688 (1990), the awarding of punitive damages against a religious body can be truly destructive of that faith. Unlike *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the use of the court system by private litigants does not involve an allocation by the government of the use of its own property. Unlike *Bowen v. Roy*, 476 U.S. 693 (1986), the award of punitive damages against a religious body does not involve an attempt by a religious claimant to tell the government how to run its own internal operations. On the contrary, it involves state coercion of religion, acting upon the re-

ligious body to change its internal operations and self-understanding by reducing its net worth to the point of impairing its ability to maintain and propagate its faith.

In *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. —, 110 S.Ct. 1595 (Apr. 17, 1990), this Court left standing the rule affording heightened judicial scrutiny to the protection of religious beliefs and practices where individualized determinations must be made by the government. 110 S.Ct. at 1603. In *Smith*, moreover, the majority noted that religious beliefs and practices that are communicative in character are independently protected under the Free Speech Clause. *Id.* at 1601. Accordingly, the imposition of punitive damages on religious bodies, especially for communicative acts such as invitations to religious conversion, should be governed by the line of cases reflecting special judicial concern for religious liberty. *Thomas v. Review Bd.*, 450 U.S. 707, 717-718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406-409 (1963). On any fair assessment of the cases imposing punitive damages against religious organizations, the standardless award of vast sums of money constitutes a severe burden on the free exercise of religion. Indeed, it is nothing short of “prohibitive” of the free exercise of religion, *Northwest Indian Cemetery Protective Ass’n*, 485 U.S. at 451. It can “effectively choke off an adherent’s religious practices,” *Jimmy Swaggart Ministries*, 110 S. Ct. at 697.

The impact of punitive damages on the free exercise of religion is readily apparent in a case like *International Society for Krishna Consciousness v. George*, *supra*. There, satisfaction of the judgment would require confiscation and sale of the principal temples, schools, monastic living facilities, and book publishing offices of the religion. Indeed, only the grant of a stay by this Court,

No. A-682 (Apr. 16, 1990), averted that calamity. It should be obvious that the confiscation of property or facilities dedicated to the practice of religion is a burden on free exercise, and thus requires a compelling justification.

The Court has held, however, that “punitive damages are wholly irrelevant to the state interest that justifies” liability in private defamation cases. *Gertz*, 418 U.S. at 350. Such damages “are not compensation for injury.” *Id.* Rather, as this Court has observed, they “are in effect a windfall to a fully compensated plaintiff.” *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Similarly, in cases involving alleged emotional injury on account of involvement in religious practices, there is no legitimate, let alone compelling, justification for damages that go beyond compensation for “actual harm.” *Gertz*, 418 U.S. at 350. “Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing [worshippers].” *Fact Concerts*, 453 U.S. at 267.

Defenders of expansive tort liability in the commercial context have argued that there is a sound economic rationale for punitive damages. Without taking a position on the validity of those arguments in the commercial context, amici wish to point out that they are utterly inapposite in the context of emotional distress torts against religious bodies.

First, defenders of expansive liability argue that commercial defendants are able to “spread the risk.” Yet this rationale has a very different implication when the risk is being spread among stockholders who have invested in a corporation with the expectation of financial gain, or among purchasers of a product or service who receive material benefits from it, than when it is being spread among adherents to a religious body whose only connection to the “risk” is that they contribute to the ministry of the church and worship in the community it

provides. The rationale of reaching a sufficiently "deep pocket" to compensate a victim has very different implications when the pocket is the common fund of the speculative investors, prepared for the risks of doing business with its attendant liabilities, than when it is the free-will offerings of persons who have contributed to a religious body for the purpose of advancing spiritual ends. And the rationale of acknowledging the cost of damage awards as a concomitant of profit-taking is obviously more cogent in the context of profit-making enterprises. See E. Gaffney and P. Sorensen, *Ascending Liability in Religious and Other Nonprofit Organizations* (1984).

Second, the defenders of expansive liability argue that increased deterrence is needed, beyond compensation for actual harm, because the risk of underdeterrence is more dangerous than the risk of overdeterrence. But however free a state may be to adopt rules that err in favor of overdeterrence, it is not entitled to extend its policy of overdeterrence to the spiritual realm. In the First Congress, Representative Daniel Carroll of Maryland announced his support for the proposed First Amendment because "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 *Annals of Congress* 757 (Aug. 15, 1789). Similarly, this Court has stated that when tortious activity "occurs in the context of constitutionally protected activity"—such as conversion into, and practice of, religion—"‘precision of regulation’ is demanded." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982); *NAACP v. Button*, 371 U.S. 415, 438 (1963). Punitive damages are more than a "gentle touch." They are a crushing blow. They have all the "precision of regulation" of a "meat-ax ordinance." *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring).⁵

⁵ If the unfettered discretion of licensing authorities must be reined in to protect first amendment values, see, e.g., *Hynes v.*

There is another reason why punitive damages should be viewed differently in the context of a religious organization than in the context of a profit-making venture. To the extent that punitive damages achieve their deterrent effect on religious bodies, they may offend the First Amendment by inducing or even coercing a compromise of sincerely held religious beliefs and practices in order to avoid further liability. That effect, of course, may constitute a chill on protected religious activity and an infringement of religious autonomy.

This is not to say that religious organizations are free to engage in tortious acts with no consequence for their behavior. Amici do not argue for an absolute charitable immunity. We merely note that in a profit-making corporation, the threat of punitive damages, measured against net worth, is effective because it is always a threat to corporate surplus and profits. Imposing punitive damages will induce the stockholders and managers to monitor the activities of their agents to reduce the exposure. In a religious body, however, the motivations for allegedly tortious conduct may have been spiritual in nature (even if misguided), and the adherents to the religion, who bear the brunt of the verdict, may have no practical means for controlling the alleged wrongdoers.

The effect is particularly troubling in the setting of denominations with a congregational polity, since the central denomination has no authority to control the activities of its fellow churches. It is also particularly troubling in the setting of denominations whose officials are not subject to the control of the membership. In both of these settings, the imposition of punitive damages affords no comparable lesson afforded the corporate de-

Mayor of Oradell, 425 U.S. 610 (1976); *Lorell v. Griffin*, 303 U.S. 444 (1938), so must the discretion of juries be cabined when they threaten to weaken those values.

fendant. It can be as pointless as it is cruel. But the imposition of punitive damages is unduly destructive in any religious community, whatever its organizational structure, because thousands of innocent believers are forced to pay for wrongs in which they took no part. See *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) ("blameless or unknowing" taxpayers who "took no part in the commission of the tort" should not be liable for punitive damages in 1983 actions); see also *Int. Brotherhood of Elect. Workers v. Foust*, 442 U.S. 42 (1979) (rank and file not liable for punitive damages arising out of duty of fair representation in union setting).

Whatever credence this Court is inclined to give arguments in favor of punitive damages in the commercial setting, amici urge that the Court note in its opinion the significant differences between for-profit corporations and not-for-profit corporations (including religious organizations), and to clarify that these arguments have no applicability in a First Amendment setting.

II. PROCEDURAL PROTECTIONS IN CASES INVOLVING FIRST AMENDMENT RIGHTS ARE SIMILAR TO, BUT MORE EXTENSIVE THAN, THOSE REQUIRED IN COMMERCIAL CASES UNDER THE DUE PROCESS CLAUSE

This Court has recognized that cases involving unconventional or unpopular expression require procedural safeguards to guard against jury abuse. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Gertz, supra*. Indeed, "procedural safeguards often have a special bite in the First Amendment context." *Chicago Teachers' Union v. Hudson*, 475 U.S. 292, 303 n. 12 (1986). Thus, amici request that the Court acknowledge in its opinion in this case that whatever protections against standardless or excessive punitive damages the Due Process Clause may afford a com-

mercial litigant, additional protections may well be needed in a First Amendment context.

In both *Gertz, supra*, and *Hustler, supra*, the requirement of clear and convincing evidence of actual malice (in the *New York Times* sense) was thought necessary "to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler*, 458 U.S. at 56. The free exercise of religion needs breathing room too." Where a religious body engages in its mission in order to share its vision of the good with others, that religious body is at the very least entitled to a presumption of good will or good faith similar to that extended to media corporations.

The fundamental problem is that juries may "use their discretion selectively to punish expressions of unpopular views." *Gertz*, 418 U.S. at 350. See also *Foust*, 442 U.S. at 50-51 n. 14. These concerns are particularly ap-

"Of course, the nature of the procedural safeguards will be different in different contexts. See *Hustler Magazine*, 485 U.S. at 49 ("a literal application of the actual malice rule is [not necessarily] appropriate in the context of an emotional distress claim"). If interpreted to allow claims based on mere "knowing" or "reckless" infliction of emotional distress, the actual malice standard would simply replicate the "intentionality" requirement of these common law torts. Thus, a jury that finds liability for intentional infliction of emotional distress would, by definition, also find the "malice" necessary for an award of punitive damages even if the infliction of distress is neither "intentional" nor "malicious" in the ordinary sense of those terms. Moreover, there are occasions when a minister or officer of a church may properly be called to "inflict emotional distress" if this is necessary to call his flock to repentance. In *Wollersheim*, the court of appeal expressly noted that "one of the functions of many religions" is "to 'afflict the comfortable'—to deliberately generate deep psychological discomfort as a means of motivating 'sinners' to stop 'sinning.'" 212 Cal. App. 3d 872, 892, 260 Cal. Rptr. 331, 344 (1989). See, e.g., the famous sermon of Jonathan Edwards, "Sinners in the Hands of an Angry God," 1 *Annals of America* 423-33 (1968). It is, of course, fundamental to free exercise jurisprudence that the government must stay out of the business of censoring sermons and religious teaching. See, e.g., *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

propriate to litigation involving the activities of unconventional religious groups. According to recent polling data, a majority of Americans find the religious beliefs and practices of non-mainline religions so distasteful that they are prepared to override important safeguards against abuse of governmental power to suppress those views. For example, about two-thirds (65%) agree that "it should be against the law for unusual religious cults to try to convert teenagers." *The Williamburg Charter Survey on Religion and Public Life*, 7 J. L. & Relig. — (forthcoming 1990). More than half (57%) endorse the idea that "the FBI should keep a close watch on new religious cults."

Although the principal target of the new wave of tort litigation against religious bodies these days appears to be unpopular religions at the fringe of American society, all religious organizations are potential targets. For example, in Idaho a jury recently imposed punitive damages against the bishop of an ultra-traditionalist Catholic group in the same amount—\$1 million—the the Alabama jury imposed on the petitioner insurance company in this case. *O'Neil v. Schuckardt*, 733 P.2d 698 (Idaho 1986) (tort of alienation of affection arising from theological convictions about interfaith marriages).

Religious prejudice can be ugly. See, e.g., G. Myers, *History of Bigotry in the United States* (H. Christman ed. 1960). This prejudice can be magnified during a civil trial, where plaintiffs' lawyers are often allowed to make arguments of a misleading and inflammatory nature. The records in both the *George* and *Wollersheim* cases are replete with appeals to the fears and prejudices of the jury. Counsel in the *George* case castigated the Hare Krishna religion as a "pernicious evil" and asked members of the jury to "imagine your child going to a Hare Krishna temple." The trial court in *Wollersheim* allowed similar pejorative attacks by counsel upon Scientology. The jury verdicts—totalling over \$32.5 million in *George* and \$30 million in *Wollersheim*, all on account of intan-

gible emotional injuries—are eloquent evidence of the susceptibility of juries to inflammatory advocacy.

Emotional appeals to the jury seem, regrettably, to be standard fare in tort litigation in many parts of the country. Especially where the victims of these appeals are vulnerable, unpopular minority religions, the First Amendment requires imposition of safeguards more powerful and more extensive than those necessary in commercial litigation.

III. THE REASONS FOR LIMITING JURY DISCRETION TO AWARD PUNITIVE DAMAGES ALSO APPLY TO SO-CALLED "COMPENSATORY" DAMAGES FOR INTANGIBLE EMOTIONAL HARMS

The petition in this case addresses only the imposition of punitive damages. But in tort suits against religious organizations, including the two being held by this Court, the punitive damages issues are intertwined with questions regarding standards for liability for intangible emotional harms. Amici ask the Court to recognize that constitutional limitations on the standardless imposition of damages by juries may apply as well to so-called "compensatory" damages for emotional distress torts against religious organizations. To this end, the Court should either address these related questions on review of one or both of the held cases, or enable the lower courts to do so on remand by vacating not only the punitive damages portions of the judgments in the held cases, but also the portions imposing liability on the claims of emotional injury.

This Court has recognized, in the context of private defamation actions, that even "compensatory" damages for such intangible harms as impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering are subject to constitutional constraints. *Gertz*, 418 U.S. at 350. Where such claims are involved, the Court held, "juries must be limited by appropriate instructions, and all awards must be sup-

ported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury. *Id.* Under *Gertz*, therefore, such issues are not left to the vagaries of state tort law; they must be scrutinized under the United States Constitution.

Emotional distress suits have many of the same characteristics that make punitive damages constitutionally problematic. Like punitive damages, "compensatory" damages for these torts are highly discretionary. There are no objective standards to determine whether the sum awarded is too much, too little, or just right. In the *George* case, for example, the jury awarded over \$3 million in "compensatory" damages for emotional distress, despite the lack of any evidence of violence, threats of violence, or mistreatment. In *Wollersheim*, the jury awarded \$5 million for emotional distress. It is all but certain that "compensatory" damages of this magnitude already contained a substantial punitive element. These awards are several times the amount awarded as punitive damages against the insurance company in this case. It would be pointless for this Court to announce careful standards for the award of punitive damages, and then leave juries free to make the same awards, or worse, under the guise of "compensation."

Similarly, the common law standards for imposition of liability for infliction of emotional damages are similar to those for imposition of punitive damages. For example, the key element in the emotional distress tort is the finding that the defendant's conduct was "outrageous." Any jury willing to call religious conduct "outrageous" is equally likely to find that it was "malicious, oppressive, and fraudulent."⁷ This Court has had occasion to note

⁷ In *Wollersheim* the jury was instructed that it might award punitive damages if it found that the "defendant was guilty of oppression or malice" in the conduct on which it based a finding of liability. The court then instructed the jury that malice means conduct "intended to cause injury to the plaintiff." Thus once a

that "'outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine*, 485 U.S. at 55. If the standards for imposition of punitive damages must be revised to comport with due process, then the standards for the imposition of "compensatory" damages for emotional distress torts require revision as well.

CONCLUSION

For the reasons set forth in this brief, the Court should acknowledge in its opinion in this case that whatever protections against standardless or excessive punitive damages the Due Process Clause may afford a commercial litigant, additional protections may well be needed in a First Amendment context.

Respectfully submitted,

MICHAEL J. WOODRUFF
Counsel of Record
Center for Law and
Religious Freedom
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
(703) 642-1070

FOREST D. MONTGOMERY
General Counsel
National Association of
Evangelicals
1023 Fifteenth St., N.W.
Suite 500
Washington, D.C. 20005
Attorneys for Amici Curiae

jury finds intentional infliction of emotional distress, that satisfies the intent standard for malice and triggers the award of punitive damages. There is no significant difference between the standards for finding liability and for imposing punitive damages.

APPENDIX A

PARTICULAR STATEMENTS OF INTEREST
OF THE AMICI

The National Council of Churches of Christ in the U.S.A. (NCC) is a community of thirty-two religious communions numbering over 40 million members. All of these communions—through their representatives on the Governing Board of the NCC—support the right of religious bodies to engage in efforts to share their message with others. The NCC joins this brief in support of the right of a religious body to share its message freely without fear of crippling punitive damages.

The National Association of Evangelicals is a non-profit association of evangelical Christian organizations, including fifty thousand churches from seventy-seven denominations. NAE, which represents a constituency of fifteen million people, serves a broad cross-section of churches for the purpose of a united voice and action.

The Catholic League for Religious and Civil Rights (League) is a non-profit voluntary association, national in membership, organized to promote good will and harmonious relations in the community, to combat all forms of religious prejudice and discrimination, and to defend the rights and sanctity of each human life. The League is concerned with the grave threat to the religious freedom rights of all religious groups that is posed by the imposition of punitive damages for alleged emotional injuries.

The Christian Legal Society is a non-profit professional association of 3,500 Christian judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society, founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and prac-

tices and the respect for religious rights as required by the First Amendment. The Center has taken an active role in cases where claimants improperly filed tort claims and sought punitive damages against churches. It believes that churches and synagogues are entitled to no less protection in the exercise of their First Amendment freedom than commercial enterprises in the operation of a business.

The Coalition for Religious Freedom (CRF) is a non-profit, tax-exempt educational organization incorporated in the District of Columbia in 1984. Originally begun as a coalition of evangelical and independent Christian churches, CRF now includes Americans of all faiths. In addition to its research and education about church-state issues in the United States, the Coalition offers advice and mediation to persons involved in disputes over religious liberty issues. CRF has a vital interest in the standards under which courts may impose tort liability for religiously motivated acts.

The Council on Religious Freedom (Council) is a non-profit corporation formed to uphold and promote the principle of religious liberty. The Council's objectives and purposes include promoting the constitutional principle of free exercise of religion, opposing any encroachment by governmental agencies, including the judicial branch of government, which would limit or tend to inhibit such exercise, and responding to other acts interfering with the full exercise of religious freedom. The Council is a membership organization, with dues-paying members throughout the United States. The Board of Directors is composed of individuals who are active in religious affairs. Some of the Directors serve in an official capacity in a religious organization, others on a lay basis. All the Directors recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries free from governmental intrusion, whether that interference be from the executive, legislative, or judicial branches of the government. The

Council speaks to the legal issues raised by this litigation because punitive damages have now become a weapon to destroy churches in violation of the due process clause.

The Unitarian Universalist Association is a voluntary religious association of 1,000 congregations in the United States. The Association frequently intervenes in cases where important First Amendment rights are at stake. This case in particular affords the Court the opportunity to clarify the procedural rights secured to religious bodies in suits arising in a First Amendment context.

18
No. 89-1279

Supreme Court, U.S.

FILED

JUN 1 1990

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY, PETITIONER

v.

CLEOPATRA HASLIP, ET AL., RESPONDENTS

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF ARTHUR ANDERSEN & CO.,
COOPERS & LYBRAND, DELOITTE & TOUCHE,
ERNST & YOUNG, KPMG PEAT MARWICK,
AND PRICE WATERHOUSE AS AMICI CURIAE
IN SUPPORT OF PETITIONER

Of Counsel:

JON N. EKDAHL

General Counsel

Arthur Andersen & Co.

69 W. Washington Street

Chicago, Illinois 60602

HARRIS J. AMHOWITZ

General Counsel

Coopers & Lybrand

1251 Avenue of the Americas

New York, New York 10020

LEONARD P. NOVELLO *

General Counsel

KPMG Peat Marwick

767 Fifth Avenue

New York, New York 10153

(212) 909-5512

** Counsel of Record*

[Additional Of Counsel Listed on Inside Cover]

June 1, 1990

HOWARD J. KRONGARD

General Counsel

Deloitte & Touche

1633 Broadway

New York, New York 10019

CARL D. LIGGIO

General Counsel

Ernst & Young

277 Park Avenue

New York, New York 10172

ELDON OLSON

General Counsel

Price Waterhouse

1251 Avenue of the Americas

New York, New York 10020

QUESTIONS PRESENTED

Amici will address the following questions, the first of which corresponds to Question 2, and the second to Questions 1 and 3, in the petition for a writ of certiorari:

1. Whether the Due Process Clause forbids the imposition of punitive damages under a respondeat superior theory on an entity that has not engaged in any culpable conduct.

2. Whether allowing juries to rely on the ratio of punitive to compensatory damages and the size of the defendant provides the kind of standards necessary to prevent unconstitutionally arbitrary and excessive awards of punitive damages.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTEREST OF THE AMICI CURIAE	1
STATEMENT	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. DUE PROCESS FORBIDS THE IMPOSITION OF PUNITIVE DAMAGES BASED ON A VICARIOUS LIABILITY THEORY AGAINST AN ENTITY THAT IS NOT ITSELF CULPA- BLE	7
A. The Due Process Clause Forbids The Imposi- tion Of Punishment Without Culpability	8
B. The Vicarious Imposition Of Punitive Dam- ages Constitutes Punishment Without Culp- ability	12
1. Punitive Damages Constitute Punish- ment	12
2. Respondeat Superior Liability Is Im- posed Without Culpability	14
3. The Organization and Activities Of Large Accounting Firms Graphically Illustrate The Danger Of Punitive Damages Im- posed On The Basis Of Vicarious Liabil- ity	20
4. The Imposition Of Vicarious Punitive Liability On Professional Service Firms Is Not Necessary To Further The Deter- rent Purpose Of Punitive Damages	24
II. THE CONSTITUTIONALLY PERMISSIBLE MEASUREMENT OF A PUNITIVE DAMAGE AWARD SHOULD NOT TURN SOLELY ON A MULTIPLE OF COMPENSATORY DAM- AGES OR THE SIZE OF THE DEFENDANT..	26

TABLE OF CONTENTS—Continued

	Page
A. A Numerical Ratio Between Compensatory Damages And Punitive Damages Cannot By Itself Ensure A Constitutionally Permissible Limit On The Size Of Punitive Damage Awards	27
B. The Size Of A Punitive Damage Award Cannot Be Justified Solely By Reference To The Size Of An Institutional Defendant	29
CONCLUSION	30

TABLE OF AUTHORITIES

Cases:	Page
<i>American Society of Mechanical Engineers v. Hydrolevel Corp.</i> , 456 U.S. 556 (1982)	15
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	6, 11, 13
<i>Blue Chip Stamps v. Manor Drug Stores</i> , 421 U.S. 723 (1975)	2
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978)	17-18
<i>Browning-Ferris Industries v. Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989)	9
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	13, 14, 19
<i>Cline v. Frink Dairy Co.</i> , 274 U.S. 445 (1927)	12-13
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	9
<i>Dean Witter Reynolds, Inc. v. Genteel</i> , 346 Pa. Super. 336, 499 A.2d 637 (1985), allocatur denied, 514 Pa. 639, 523 A.2d 346 (1987)	5
<i>Douglass v. Hustler Magazine, Inc.</i> , 769 F.2d 1128 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986)	18
<i>Embrey v. Holly</i> , 293 Md. 128, 442 A.2d 966 (1982)	5
<i>Felton v. United States</i> , 96 U.S. 699 (1877)	6, 9
<i>First Small Business Inv. Co. v. Butler, Binion, Rice & Knapp</i> , No. H-84-3276 (S.D. Tex. 1987), rev'd as time barred, No. 87-6167 (5th Cir. May 9, 1990)	28
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	13
<i>Giacco v. Pennsylvania</i> , 382 U.S. 399 (1966)	10, 12
<i>Hagan v. Providence & Worcester Railroad</i> , 3 R.I. 88 (1854)	8
<i>Hatrock v. Edward D. Jones & Co.</i> , 750 F.2d 767 (9th Cir. 1984)	5, 24
<i>Hawkins v. Allstate Ins. Co.</i> , 733 P.2d 1073 (Ariz.), cert. denied, 484 U.S. 874 (1987)	30
<i>In re Osborne Securities Cases</i> , Coordination Proceeding No. 1805 (Santa Clara Cty., Cal. 1987), appeal pending, No. H003695 (Cal. App.) (argued April 24, 1990)	28
<i>In re P & E Boat Rentals, Inc.</i> , 872 F.2d 642 (5th Cir. 1989)	14

TABLE OF AUTHORITIES—Continued

	Page
<i>In re Paris Air Crash</i> , 622 F.2d 1315 (9th Cir.), cert. denied, 449 U.S. 976 (1980)	14, 22, 27
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977)	10
<i>International Brotherhood of Electrical Workers</i> <i>v. Foust</i> , 442 U.S. 42 (1979)	13
<i>Keene v. Lizardi</i> , 8 La. 26 (1835)	15
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144 (1963)	13
<i>Lake Shore & M.S. Ry. v. Prentice</i> , 147 U.S. 101 (1893)	6, 8, 15
<i>Lambert v. California</i> , 355 U.S. 225 (1957)	9, 10
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	12
<i>Louis Pizitz Dry Goods Co. v. Yeldell</i> , 274 U.S. 112 (1927)	11
<i>Manufacturers Hanover Trust Co. v. Arthur</i> <i>Andersen & Co.</i> , No. 82-CIV-6622 (S.D.N.Y. 1988)	28
<i>Meleski v. Pinero Int'l Restaurant, Inc.</i> , 47 Md. App. 526, 424 A.2d 784 (1981)	24
<i>Mooney v. Holohan</i> , 294 U.S. 103 (1935)	9
<i>Mullins v. Ward</i> , 712 P.2d 55 (Okla. 1985)	4
<i>Peat Marwick Main & Co. v. Tew</i> , No. 87-1727, cert. denied, 486 U.S. 1055 (1988)	21
<i>Purvis v. Pratteco, Inc.</i> , 595 S.W.2d 103 (Tex. 1980)	5
<i>Republic Venture Group, Inc. v. Butler, Binion,</i> <i>Rice & Knapp</i> , No. H-85-3528 (S.D. Tex. 1987), rev'd as time barred, No. 87-6167 (5th Cir. May 9, 1990)	28-29
<i>Schall v. Martin</i> , 467 U.S. 253 (1984)	11
<i>Scioto Memorial Hospital Ass'n v. Price Water-</i> <i>house</i> , No. 85CV-08-4513 (Ct. Common Pleas, Franklin Cty., Ohio 1988) (post-trial motion pending)	28
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	4, 13, 25, 28
<i>Southern Ry. v. Bush</i> , 122 Ala. 470, 26 So. 168 (1899)	11
<i>Stroud v. Denny's Restaurant, Inc.</i> , 532 P.2d 790 (Or. 1975)	5

TABLE OF AUTHORITIES—Continued

	Page
<i>The Billings Clinic v. Peat Marwick Main & Co.</i> , No. DV-85-2687 (13th Judicial Dist., Yellow- stone Cty., Mont. 1988), appeal pending, No. 88-623 (Mont.)	28
<i>Thompson v. City of Louisville</i> , 362 U.S. 199 (1960)	6, 10
<i>Thyssen, Inc. v. S.S. Fortune Star</i> , 777 F.2d 57 (2d Cir. 1985)	15
<i>Tippecanoe Beverages, Inc. v. S.A. el Aguila Brew-</i> <i>ing Co.</i> , 833 F.2d 633 (7th Cir. 1987)	17
<i>Touche Ross & Co. v. Commercial Union Ins. Co.</i> , 514 So. 2d 315 (Miss. 1987)	23
<i>United States v. Clark</i> , 360 F. Supp. 936 (S.D. N.Y.), mandamus denied, 481 F.2d 276 (2d Cir. 1973)	21
<i>United States v. Halper</i> , 109 S. Ct. 1892 (1989) ..	11, 12, 13
<i>United States v. Natelli</i> , 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976)	22
<i>United States v. Park</i> , 421 U.S. 658 (1975)	11
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	11
<i>United States v. Simon</i> , 425 F.2d 796 (2d Cir. 1969), cert. denied, 397 U.S. 1006 (1970)	21
<i>Weber v. Aetna Casualty & Surety Co.</i> , 406 U.S. 164 (1972)	12
<i>Westmont Tractor Co. v. Touche Ross & Co.</i> , No. 87-4242 (9th Cir. 1988)	28
<i>Williams v. City of New York</i> , 508 F.2d 356 (2d Cir. 1974)	14
<i>Wooderson v. Ortho Pharmaceutical Corp.</i> , 681 P.2d 1038 (Kan.), cert. denied, 469 U.S. 965 (1984)	4

Constitution and Statutes:

U.S. Const.:

Amend. V:

Double Jeopardy Clause 13

Due Process Clause 9

Amend. XIV 7, 9, 26, 27

Due Process Clause *passim*

TABLE OF AUTHORITIES—Continued

	Page
15 U.S.C. § 15	29
15 U.S.C. § 77aa (Schedule A) (25)-(27)	2
15 U.S.C. § 78l(b) (1) (J)-(K)	2
<i>Miscellaneous:</i>	
Comment, <i>Punitive Damages Insurance: Why Some Courts Take the Smart Out of "Smart Money"</i> , 40 U. Miami L. Rev. 979 (1986)	4
Ellis, <i>Fairness and Efficiency in the Law of Punitive Damages</i> , 56 S. Cal. L. Rev. 1 (1982) 4, 8-9, 17, 18	
Fama & Jensen, <i>Agency Problems and Residual Claims</i> , 26 J.L. Econ. 327 (1983)	20
Fischel, <i>The Regulation of Accounting: Some Economic Issues</i> , 52 Brooklyn L. Rev. 1051 (1987) ..	20, 25
J. Ghiardi & J. Kircher, <i>Punitive Damages Law and Practice</i> (1985)	4
R. Gormley, <i>The Law of Accountants and Auditors</i> (1981)	22
O. Holmes, <i>The Common Law</i> (1981)	10
W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, <i>Prosser & Keeton on Torts</i> (5th ed. 1984)	4
C.T. McCormick, <i>Handbook on the Law of Damages</i> (1935)	14
Morris, <i>Punitive Damages in Tort Cases</i> , 44 Harv. L. Rev. 1173 (1931)	8, 23
Note, <i>Detecting and Preventing Financial Statement Fraud: The Roles of the Reporting Company and the Independent Auditor</i> , 5 Yale L. & Pol'y Rev. 514 (1987)	2, 25
Note, <i>The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employes</i> , 70 Yale L.J. 1296 (1961) 8, 16, 23, 25	
Note, <i>The Publicly Held Corporation and the Insurability of Punitive Damages</i> , 53 Fordham L. Rev. 1383 (1985)	3-4
K. Redden, <i>Punitive Damages</i> (1980)	4
Restatement (Second) of Torts	4, 16

TABLE OF AUTHORITIES—Continued

	Page
Ricardo-Campbell, <i>Comments on the Structure of Ownership and the Theory of the Firm</i> , 26 J.L. Econ. 391 (1983)	20
SECPS Manual (AICPA Div. for CPA Firms, SEC Practice Section 1986)	26
Siliciano, <i>Negligent Accounting and the Limits of Instrumental Tort Reform</i> , 86 Mich. L. Rev. 1929 (1988)	20, 21
<i>System of Quality Control for a CPA Firm</i> , 2 AICPA Professional Standards (CCH) (1979) .	25

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY, PETITIONER

v.

CLEOPATRA HASLIP, ET AL., RESPONDENTS

On Writ of Certiorari to the Supreme Court of Alabama

**BRIEF OF ARTHUR ANDERSEN & CO.,
COOPERS & LYBRAND, DELOITTE & TOUCHE,
ERNST & YOUNG, KPMG PEAT MARWICK,
AND PRICE WATERHOUSE AS AMICI CURIAE
IN SUPPORT OF PETITIONER**

INTEREST OF THE AMICI CURIAE

With the consent of the parties pursuant to Rule 37 of the Rules of this Court, the amici curiae submit this brief in support of petitioner.

The amici curiae are firms engaged in the practice of the profession of accounting and auditing. They believe they are the six largest firms practicing this profession in the United States, reporting, collectively, on the financial statements of more than 90 percent of those companies whose securities are publicly traded in the United States. The amici, which are organized as partnerships, are collectively composed of nearly 9000 partners and more than 78,000 other professional employees, and practice in some 600 offices throughout the United States.

Congress long ago concluded that independent public accountants perform an important public service. Under the Securities Act of 1933 and the Securities Exchange

Act of 1934, all public companies whose securities are registered with the Securities and Exchange Commission must have their financial statements examined by public accountants. See 15 U.S.C. § 77aa (Schedule A) (25)-(27); *id.* § 78l(b)(1)(J)-(K).

Amici have in recent years become chronically targeted by plaintiffs as a "deep pocket" in various types of commercial tort litigation. Specifically, amici have witnessed a dramatic increase in the number of state and federal law claims filed against them, ostensibly based on their rendition of professional services. Four times as many such claims were filed against amici in 1989 as were filed in 1981. Amici are concerned that this increase in exposure to the risks of litigation may cause them difficulty in attracting and retaining the most qualified of professional personnel. See Note, *Detecting and Preventing Financial Statement Fraud: The Roles of the Reporting Company and the Independent Auditor*, 5 Yale L. & Pol'y Rev. 514, 526 (1987) (accounting profession is "finding it increasingly difficult to attract quality personnel").

The lawsuits filed against amici often contain a request for punitive damages. Even when the claim is meritless, the punitive damage claim can skew litigation strategies: it is a classic instance of a plaintiff's *in terrorem* litigation tactic, by which a lawsuit may be endowed with "a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975).

Because of the substantial impact of even the threat of punitive damages on a profession whose activities Congress has found to be in the public interest, amici believe that their views on the question of constitutional limits on the vicarious imposition of punitive damages may be of assistance to the Court's consideration of this case.

STATEMENT

The facts of this case will be stated in the parties' briefs and need not be repeated here. Amici, like petitioner Pacific Mutual Life Insurance Company, face the threat of being "punished" by punitive damages awarded under the doctrine of respondeat superior for conduct undertaken by individuals, without any showing of fault by the firm. The root constitutional problem with such vicarious punitive liability is precisely the same for corporations like petitioner and professional partnerships like amici: punishment without culpability violates elementary principles of due process. At the same time, however, amici differ from corporate defendants both in their organizational form and in the nature of their work.

The imposition of vicarious punitive liability on amici for the torts of individual auditors is an especially pernicious form of punishment-without-fault because financial statement auditing is widely misperceived as an exact science that can provide absolute insurance against accounting missteps by corporate management. In fact, the process is one requiring the exercise of judgment at every stage, and a properly performed audit can provide only *reasonable* assurance that management has not materially misstated the company's financial position. When a jury mistakes an auditor's innocent error for intentional misconduct and imposes vicarious liability without fault, it is hard to see any justification for spreading the "punishment" from him to his hundreds of partners who had nothing to do with the error. Thus, amici have a unique need for protection from unjustified and unconstitutional vicarious punishment.

In general, the rules in the various States governing the circumstances in which a jury may hold an actor liable for punitive damages based on his *own* conduct are confused, if not altogether incoherent. See Note, *The Publicly Held Corporation and the Insurability of Punitive Damages*, 53 Fordham L. Rev. 1383, 1397 (1985)

("Each jurisdiction, and sometimes it seems each judge, determines the type of behavior warranting [a punitive] award."); Comment, *Punitive Damages Insurance: Why Some Courts Take the Smart Out of "Smart Money"*, 40 U. Miami L. Rev. 979, 989 (1986) (minimum standard of culpable conduct for punitive award "has been anything but standard"). There is even more confusion and incoherence about the rules by which one may be held vicariously liable for punitive damages based on the conduct of another. Indeed, commentators are unable to agree on what vicarious punitive liability rules the States actually employ. Compare J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 24.01, at 2 (1985), with W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Torts* § 2, at 13 (5th ed. 1984) (each pronouncing opposite "majority" rules for vicarious punitive liability); see also Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 63 n.266 (1982) (criticizing "Prosser's misleading statement"). But ironically, there is one statement that can be made with certainty: those rules render it far easier to impose vicarious liability for punitive damages on a firm for the torts of its personnel than to impose punitive damages on a primary tortfeasor himself.

Roughly speaking (and bearing in mind the impossibility of neat formulations), punitive liability may not be imposed directly on an individual without the intentional or reckless commission of a civil wrong. See *Smith v. Wade*, 461 U.S. 30, 46-48 (1983); Restatement (Second) of Torts § 908; *Prosser & Keeton on Torts* § 2, at 9-10; K. Redden, *Punitive Damages* §§ 2.1, 3.1(A) (1980).¹

In contrast, juries in many jurisdictions may impose punitive damages on a firm simply for the tort of a person in a managerial position acting within the scope of

¹ A few jurisdictions hold that gross negligence may suffice for the imposition of direct punitive liability. See, e.g., *Wooderson v. Ortho Pharmaceutical Corp.*, 681 P.2d 1038, 1061 (Kan.), cert. denied, 469 U.S. 965 (1984); *Mullins v. Ward*, 712 P.2d 55, 63 n.22 (Okla. 1985).

his duties, even if the firm was altogether prudent in its hiring and supervision of that person. See, e.g., *Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767, 771-772, 773 n.3 (9th Cir. 1984) (Idaho law); *Purvis v. Prattco, Inc.*, 595 S.W.2d 163 (Tex. 1980); Restatement (Second) of Torts § 909(c). Other jurisdictions employ a still more expansive test by allowing vicarious punitive liability for the tort of any individual associated with a firm, whether or not in a "managerial" capacity. See, e.g., *Dean Witter Reynolds, Inc. v. Gentel*, 346 Pa. Super. 336, 499 A.2d 627, 643 (1985), allocatur denied, 514 Pa. 639, 523 A.2d 346 (1987); *Embrey v. Holly*, 293 Md. 128, 442 A.2d 966, 969-971 & n.6 (1982); *Stroud v. Denny's Restaurant, Inc.*, 532 P.2d 790 (Or. 1975). The upshot is that in most jurisdictions a firm may be subjected to vicarious punitive damage liability despite the total absence of tortious conduct on the part of the firm itself and despite the firm's inability, as a practical matter, to prevent the commission of the underlying tort.

Not surprisingly, such harsh yet porous rules offer virtually no protection against the unfettered imposition of vicarious punitive liability. In our view, a vicarious punitive award against a firm under the state law standards outlined above is a violation of due process if the firm did not itself engage in culpable conduct. In the absence of such conduct, a jury awarding punitive damages against a firm that is only vicariously liable will be meting out punishment that neither stems from nor deters culpable behavior but merely punishes an entity for employing the wrongdoer, who will rarely be acting in his employer's interest when he does the wrong. The award thus becomes a wholly gratuitous punishment of innocent persons—a violation of basic rules of due process.

SUMMARY OF ARGUMENT

I. The version of respondeat superior applied below permits the imposition of punitive damages on an entity for the act of its employee without any fault on the part of the entity. This Court long ago condemned punishment of the innocent through vicarious imposition of

punitive damages. *Lake Shore & M.S. Ry. v. Prentice*, 147 U.S. 101 (1893). The question now before the Court is whether the feature of such vicarious liability that makes it objectionable—the imposition of punishment without culpability—is of constitutional dimension.

The principle that there cannot be punishment without culpability is firmly grounded in this Court's due process cases. From *Felton v. United States*, 96 U.S. 699 (1877), through *Thompson v. City of Louisville*, 362 U.S. 199 (1960), through *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court has reaffirmed that basic principle of due process. Although the Due Process Clause allows the States to demand *compensation* without culpability, it has never permitted *punishment* without any culpability on the part of the person or entity punished.

Punitive damages are indeed punishment. Their justifications are retribution and deterrence. But it makes no sense to exact retribution from those who have done no wrong, and one cannot deter by punishing someone who did not engage in the misconduct and could not have prevented it.

That kind of unconstitutional punishment-without-fault is what occurred in this case. Lemmie Ruffin, not Pacific Mutual, engaged in gross misconduct, and the courts below did not even ask whether anyone other than Ruffin committed misdeeds that could be blamed on Pacific Mutual as an entity.

Amici's auditing activities exemplify the gross unfairness of the system in which one person's acts lead to punishment of others. Amici are organized as large, decentralized entities precisely to enable them to provide proper service to their clients. On extremely rare occasions, individual professionals may engage in flagrant misdeeds, and more commonly they may make debatable judgments or innocent mistakes, but it is completely senseless to punish the thousands of partners in a firm who may not even be aware that a particular audit is taking place, let alone that it is being mishandled.

In the case of amici, punitive damages are an especially inappropriate way to foster the deterrence of undesirable conduct. Amici's professional reputations, and exacting requirements imposed by professional organizations, already induce amici to spend hundreds of millions of dollars on preventive quality control measures. There is no need for any additional incentives that might be provided by allowing the States to punish amici for misdeeds committed without their complicity.

II. The *amount* of a punitive damage award against a firm or an individual must also satisfy the purposes behind the imposition of punitive damages to avoid running afoul of Fourteenth Amendment limitations. Although a variety of factors may be constitutionally appropriate to consider in determining the size of a punitive award, neither a simple multiplication of the compensatory damage award nor a simple reference to the size of the defendant should suffice, standing alone, to justify the amount of a punitive award. Multiplication of compensatory damages leads to excessive results when, as with amici, potentially very large compensatory awards—themselves wholly disproportionate to the relatively small gains realized by the wrongdoing—already provide substantial punishment and deterrence. Mere reference to the size of the firm is even less appropriate because it sets the amount of the punitive award by reference to the wrongdoer rather than the wrong. A focus on the actual or expected gain from the wrong would be a more appropriate constitutional benchmark for petitioner, amici, and other organizations that are charged with economic torts.

ARGUMENT

I. DUE PROCESS FORBIDS THE IMPOSITION OF PUNITIVE DAMAGES BASED ON A VICARIOUS LIABILITY THEORY AGAINST AN ENTITY THAT IS NOT ITSELF CULPABLE

Notwithstanding the number of courts that have permitted the imposition of punitive damages on the basis of respondeat superior, the practice violates elementary

principles of due process. This Court's cases have long established that the imposition of punishment without culpability is unconstitutional. And the vicarious imposition of punitive damages—without any determination that the principal even violated a duty of care in selecting the wayward agent, let alone engaged in misconduct of its own—constitutes just such punishment without culpability.

A. The Due Process Clause Forbids The Imposition Of Punishment Without Culpability

Respondeat superior or vicarious liability, of course, is by definition the imposition of liability on the principal for the act of the agent, completely without regard to the role of the principal. Wrongdoing by the principal is altogether unnecessary. The argument against the vicarious imposition of punitive damages, therefore, is the simple point that one who has done no wrong should not be punished.

In forbidding vicarious punitive damages against a corporation under federal common law, this Court stated simply: "‘No man should be punished for that of which he is not guilty.’" *Lake Shore & M.S. Ry. v. Prentice*, 147 U.S. 101, 115 (1893) (quoting *Hagan v. Providence & Worcester Railroad*, 3 R.I. 88, 91 (1854)). Commentators have long accepted this fundamental proposition. "If there is no proof to show the master's wrong, there is no basis for measured severity of admonition, and so no place for the doctrine of punitive damages." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1205 (1931). "Ethical considerations suggest that shareholders whose fault cannot be established should not be held liable for punitive damages * * *." Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 Yale L.J. 1296, 1306-1307 (1961). "[P]roponents of vicarious punitive damage liability have difficulty arguing that employers deserve to be punished for the wrongful acts of their employees. Rarely does one see a positive assertion

to that effect." Ellis, *supra*, 56 S. Cal. L. Rev. at 66-67 (footnote omitted).

The question before this Court is whether the principle underlying opposition to the vicarious imposition of punitive damages—that punishment should not be imposed without fault—is of constitutional dimension. It plainly is.

More than a century ago, this Court wrote in *Felton v. United States*, 96 U.S. 699, 703 (1877), that "the law * * * is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one." Such an injustice is exactly what the Due Process Clauses of the Fifth and Fourteenth Amendments forbid.

Substantive due process, "in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Furthermore, "[t]he touchstone of due process is protection of the individual against arbitrary action of government,"² and punishment for blameless conduct is surely an example of arbitrary governmental action. Thus, the principle that there can be no punishment without guilt has come to be recognized as one grounded in the Due Process Clauses.

For example, in *Lambert v. California*, 355 U.S. 225 (1957), in overturning a conviction as a matter of substantive due process, the Court quoted Justice Holmes' statement that "[a] law which punished conduct which

² *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring).

would not be blameworthy in the average member of the community would be too severe for that community to bear,'” and added that “[i]ts severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it.” *Id.* at 229 (quoting O. Holmes, *The Common Law* 50 (1881)). Thus, although a State certainly is free in general to determine what is blameworthy conduct, it does not under the Due Process Clause have the same freedom to punish someone who has done nothing blameworthy.³

In a variety of different contexts, this Court has reiterated the fundamental theme that punishment is permissible only on a showing of culpability. In *Thompson v. City of Louisville*, 362 U.S. 199 (1960), dealing with the constitutional minimum predicate for the imposition of criminal punishment, the Court held that it is the Due Process Clause, not just state law, that requires some showing of “guilt” before a person can be punished. See also *Giaccio v. Pennsylvania*, 382 U.S. 399, 405 (1966) (Stewart, J., concurring) (“In the present case it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That, I think, violates the most rudimentary concept of due process of law.”). In *Ingraham v. Wright*, 430 U.S. 651, 671-672 n.40 (1977), dealing with corporal punishment of schoolchildren, the Court stated that the Due Process Clause applies “[w]hen the State seeks to impose punishment without * * * an adjudication [of guilt].” Although that principle was stated in a case principally addressing the

³ For this reason, our position does not call into question the ability of a State to define strict liability criminal offenses without a mens rea requirement. Our position is not that the State is constitutionally compelled to refrain from punishing everyone who lacks evil intent, but that the State is constitutionally compelled to make *some* inquiry into the culpability—however that may be defined—of the precise person or entity being punished. Here, no such inquiry was undertaken. It was enough for the court below that Ruffin was acting within the scope of his employment, and no inquiry into *Pacific Mutual's* culpability was made under any standard.

procedural safeguards that must accompany a particular kind of punishment, the Court has made clear that *substantive* due process imposes the requirement that punishment follow only from guilt. In *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979), dealing with the conditions of confinement of pretrial detainees, the Court cited *Ingraham's* footnote 40 and stated flatly that “[d]ue process requires that a pretrial detainee,” not yet having been determined to be guilty of anything, “not be punished.” The Court added: “Retribution and deterrence are not legitimate nonpunitive governmental objectives.” *Id.* at 539 n.20. See also *United States v. Halper*, 109 S. Ct. 1892, 1902 (1989); *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Schall v. Martin*, 467 U.S. 253, 264, 269 (1984).

There is, of course, no principle forbidding any and all imposition of liability without a showing of culpability. Tort liability for compensatory damages does not involve punishment and thus generally does not raise due process problems. See note 6, *infra*. Furthermore, even criminal liability can be imposed without a showing of any particular *level* of culpability; it is enough that the defendant had “power * * * to prevent or correct the prohibited condition.” *United States v. Park*, 421 U.S. 658, 673 (1975). But this Court has never departed from the principle that due process requires *some* level of culpability before *punishment* can be imposed.⁴ And the

⁴ *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), is not an exception to that principle. The statute involved in that case had been construed to be “‘remedial, and not penal,’” and the Court addressed the case “on the assumption that its scope was thus limited.” 274 U.S. at 114, 115 (quoting *Southern Ry. v. Bush*, 122 Ala. 470, 489, 26 So. 168, 174 (1899)). The Court said by way of dicta that “the imposition of liability”—meaning *compensatory* damages—in those circumstances is not repugnant to due process, and the Court commented without necessarily approving that “some jurisdictions” extend such liability to punitive damages. The Court did *not* say, even by way of dicta, that “the imposition of punitive damages ‘without personal fault, having its foundation in a recognized public policy, is not repugnant to accepted notions of due process of law.’” Br. in Opp. 22 (quoting 274 U.S. at 115).

culpability, of course, must be that of the person or entity punished, not that of some related person. Due process would not allow the imprisonment of, or punitive monetary sanctions against, the next-door neighbor or the brother of a person shown to be culpable. Cf. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) ("the basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility or wrongdoing").

B. The Vicarious Imposition Of Punitive Damages Constitutes Punishment Without Culpability

Under the constitutional principles discussed above, States are not free to punish blameless conduct. That is just what the vicarious imposition of punitive damages does. Furthermore, the vicarious imposition of punitive damages on firms such as amici is both especially burdensome and wholly unnecessary.

1. Punitive Damages Constitute Punishment

It requires no elaborate analysis to see that punitive damages are indeed what they purport to be—punishment. This Court so stated unequivocally just last Term in *United States v. Halper*: "As the name indicates, punitive damages, available in civil cases, serve punitive goals." 109 S. Ct. at 1901 n.8. That they are not *criminal* punishment is quite immaterial for purposes of applying the due process guarantees discussed above. "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law * * *." *Id.* at 1901.⁵ Although *Halper* it-

⁵ See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (protections of Due Process Clause extend to "civil * * * defendants"); *Giaccio v. Pennsylvania*, 382 U.S. at 402 ("[b]oth liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label [of civil or criminal] a State chooses to fasten upon its conduct or its statute"); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 463 (1927) ("[t]he principle of due process of law requiring

self concerned the Double Jeopardy Clause, this Court drew on the very due process cases discussed above in concluding that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 1902 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963), and *Bell v. Wolfish*, *supra*).

Earlier cases mandate the same conclusion. The only purposes of punitive damages are retribution and deterrence. As this Court has explained, punitive damages "by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981) (emphasis added). See also *Smith v. Wade*, 461 U.S. at 49; *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

Although *City of Newport* and the other cited cases were not decided under the Due Process Clause, they supply the predicate—that punitive damages are based on "[r]etribution and deterrence," which "are not legitimate nonpunitive governmental objectives" (*Bell v. Wolfish*, 441 U.S. at 539 n.20)—necessary to see that due process forbids their imposition on those whose guilt has not been shown. One cannot properly "punish" by visiting punitive damages on "blameless or unknowing" persons who "took no part in the commission of the tort." *City of Newport*, 453 U.S. at 267. Similarly, one does not "deter" by fixing punitive liability on a person who is incapable of altering his conduct to prevent "similar

reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation").

extreme conduct." See *id.* at 267, 268-270.⁶ "Punitive damages are imposed to punish the wrongdoer and deter others from engaging in similar conduct in the future. These objectives are not achieved when courts drop the punitive damage hammer on the principal for the wrongful acts of the simple agent or lower echelon employee. As McCormick states: 'There would seem to be little justification for punishing the master for willfulness or wantonness of which the agent is alone guilty.'" *In re P & E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (citation omitted) (quoting C.T. McCormick, *Handbook on the Law of Damages* § 80, at 282 (1935)).

In light of these principles, we submit that a punitive damage award against a large professional firm based on nothing more than vicarious liability for tortious conduct by the individuals involved in a particular engagement conflicts with the underlying rationale for punitive damages and would, "by definition," constitute punishment-without-fault that is impermissible under the Due Process Clause.

2. *Respondeat Superior Liability Is Imposed Without Culpability*

As a matter of general common law, this Court condemned the vicarious imposition of punitive damages a century ago in *Lake Shore & M.S. Ry. v. Prentice*. Although not stated in a constitutional context, the principles that the Court applied are the same ones that the

⁶ As is obvious from this Court's discussion in *City of Newport*, nothing in our analysis impugns the general rule of respondeat superior for compensatory tort liability. "[W]hereas the purpose of compensatory damages—compensation of the victim—is accomplished whether payment comes from the master or his misbehaving servant, that of punitive damages—to punish the wrongdoer and deter him and others from duplicating his misconduct—is not. Unless the employer is himself guilty of some tortious act (or omission) because his employee has misbehaved, an award punishing the employer and deterring him and others situated to act likewise (*i.e.*, other employers) makes no sense at all." *Williams v. City of New York*, 508 F.2d 356, 360 (2d Cir. 1974).

Due Process Clause, as discussed above, mandates. Thus, the Court wrote:

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent. * * *

* * *

'[An award of punitive damages] is only justified in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent.' * * *

This rule has the same application to corporations as to individuals.

147 U.S. at 107-109 (quoting *Keene v. Lizardi*, 8 La. 26, 33 (1835)).⁷

⁷ In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), Members of this Court debated in footnotes whether *Lake Shore* was consistent with the decisions of state courts in the late 19th century. Compare 456 U.S. at 575 n.14 (majority) with *id.* at 589 n.15 (Powell, J., dissenting). The Court did not purport to resolve the question, however, and the question was not in fact presented by the case, which involved statutory treble damages and not punitive damages awarded by a jury. See *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 67 n.10 (2d Cir. 1985) (Friendly, J.) ("The [*Hydrolevel*] footnote seems to have been quite unnecessary since the issue was not corporate liability for punitive damages but for the treble damages provided for private antitrust suits * * *, and, as the Court itself noted, rules limiting a principal's liability for punitive damages do not apply to specific statutes giving treble damages.") (citation omitted). Thus, *Hydrolevel's* dictum about state decisions of the late 19th century is of no relevance here.

What the Court recognized in *Lake Shore*, and what is undeniable, is that the *vicarious* imposition of punitive damages is the imposition of punishment on the principal completely without regard to its level of culpability, be it high, low, or nonexistent. See generally Note, *supra*, 70 Yale L.J. at 1304-1309. In this case, for example, the Supreme Court of Alabama found it significant only that "Ruffin was [not] acting outside the scope of his agency [and] that his acts were [therefore] * * * imputable to Pacific Mutual." Pet. App. B9-B10. There was neither a jury instruction nor a determination by the state courts that Pacific Mutual *itself* had *any* culpability whatever.⁸

Indeed, the proponents of allowing punitive damage awards on the basis of respondeat superior do not attempt to support it by any reference to the fault of the

⁸ Respondents have endeavored to supply the missing factual determination (Br. in Opp. 5-6, 22), but a mere recitation of the evidence presented at trial cannot take the place of determinations made by a properly instructed jury or a state court applying its own law. In particular, once this Court establishes that it was constitutionally improper to award punitive damages against Pacific Mutual based solely on the fact that Ruffin was acting within the scope of his employment, it will be up to the state courts in the first instance to decide whether the alleged negligence of another Pacific Mutual agent (Lupia) in not remedying the fraud was enough to justify a punitive damages award against Pacific Mutual. That issue presents at least two difficult questions that may themselves implicate the Due Process Clause: (1) whether it is permissible to impute Lupia's conduct to Pacific Mutual (see generally Restatement (Second) of Torts § 909(c)); and (2) whether, contrary to the usual principles governing punitive damages (see p. 4 & note 1, *supra*), mere negligence (which is the most that Lupia's conduct could fairly be called), as opposed to willful misconduct, can give rise to punitive damages. Whatever the proper resolution of those questions, they have not yet been addressed by the state courts, because those courts held that the imposition of punitive damages was permissible on the basis of respondeat superior alone. It is that holding that is before the Court, and it is that ruling that the Court should reverse under settled principles of due process.

principal punished for his agent's tort.⁹ Often, they make no attempt to justify the rule at all, instead simply proceeding by the false syllogism that a principal is liable for the acts of his agent in the course of his agency, that the torts were committed in the course of the agency, and that therefore the principal is liable for punitive damages whenever the agent would be. See, e.g., Pet. App. B7-B10. Such reasoning completely ignores the vast distinction between compensation and punishment, yet the Due Process Clause has never permitted that distinction to be cast aside.

Those who *do* supply a theory for the vicarious imposition of punitive damages generally say that "the policy behind the doctrine of respondeat superior, that of encouraging employers and other principals to select their employees and other agents carefully, is fully engaged by" awarding punitive damages against the principal. *Tippecanoe Beverages, Inc. v. S.A. el Aguila Brewing Co.*, 833 F.2d 633, 638 (7th Cir. 1987). But that is a startling proposition when advanced to justify the imposition of punishment on one whose culpability has *not* been placed in issue and who is already liable for compensatory damages. It is one thing to say that a principal's selection of an unsuitable agent *can*—on appropriate proof—be an act so lacking in care as to constitute culpable action on which punitive damages might be based. It is quite a different thing to say that in every case the principal can be punished for selecting an agent who eventually commits a tort, even if the principal could not have foreseen the agent's misconduct and did not ratify it. Yet it is the latter formulation that must underlie the position that punitive damages can be imposed without individualized guilt. Thus, to sanction the respondeat superior rule on this basis would be "[t]o punish a person because he has done what the law plainly

⁹ "[V]icarious punitive damage liability cannot be justified as deserved punishment. Indeed, it is usually conceded to be unfair. Deterrence alone is thus relied upon to justify it." Ellis, *supra*, 56 S. Cal. L. Rev. at 71.

allows him to do"—selected an agent whose misdeeds could not be foreseen—"a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).¹⁰

To be sure, artificial entities such as corporations and partnerships can act only through human beings, and the concept of organizational "fault" necessarily presupposes that *some* individuals' acts will be deemed those of the artificial entity so as to subject it to punitive damages. But at the same time, "[a]llthough vicarious defendants are often artificial persons such as municipalities or business corporations, that serves only to disguise the fact that the punishment ultimately falls upon natural persons who have not committed wrongful or harmful acts." Ellis, *supra*, 56 S. Cal. L. Rev. at 66. Those innocent persons—shareholders or partners—entrust specific persons (corporate directors and management, or the partnership as a whole or a management committee) to act in the name of the entity, and they must accept the consequence that, if those persons in the name of the entity commit culpable misdeeds, punitive damages may follow. In addition, every corporate shareholder or member of a partnership knows that he must bear the cost of compensating anyone who is injured by

¹⁰ Equally unconvincing is the argument that "punitive damages [should] be awarded against an employer for an employee's wrongdoing *without proof of fault on the employer's part*" because, "[u]nless a corporation that profits from the wrongdoing of its agents is made to bear the cost of that wrongdoing, the corporation will have an incentive to conduct its affairs through judgment-proof employees, and will escape punishment for wrongdoing that it condones and profits from." *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1145 (7th Cir. 1985) (emphasis added), cert. denied, 475 U.S. 1094 (1986). No incentive to engage in misconduct and to "condone[]" wrongdoing exists under a system that *does* require proof of fault, because those activities plainly constitute fault. Moreover, the corporation is "made to bear the cost of that wrongdoing" through compensatory damages awarded under respondeat superior, whatever the rule concerning punitive damages. Thus, the unwanted incentives that the rule allowing no-fault punitive damages are supposed to remove do not exist in the first place.

the activities of the firm, including the activities of its low-level agents and employees. But no just principle requires that, by purchasing shares in a corporation or entering into a partnership, individuals subject themselves to *punishment* for the misdeeds of anyone and everyone who carries out any of the activities of the firm. The Due Process Clause forbids visiting such punishment on the heads of the innocent.

This Court recognized in *City of Newport* that "[n]either reason nor justice" supports the imposition of punitive damages beyond those imposed on the individual wrongdoer. 453 U.S. at 267. Not only did the Court recognize that it is "not sensibl[e]" to make an employing municipality liable for punishment for the subordinate's malice (*ibid.*), but also the Court explained why the deterrence objective of punitive damages is actually undermined by imposing liability on a collective entity rather than the individual tortfeasor: "[A]llowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, * * * directly advances the public's interest in preventing repeated" torts, and "a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer." 453 U.S. at 269, 270. Those statements referred specifically only to governmental liability, but their logic applies equally to the vicarious liability of any collective entity: a corporation or partnership, no less than a municipality, must reach into the pockets of innocent persons in order to pay punitive damages judgments occasioned by a single individual's behavior, and diffusing the judgment undermines its deterrent effect in either situation. In private cases, as in governmental cases, it simply makes no sense to visit punishment on persons who have done no wrong.

3. *The Organization And Activities Of Large Accounting Firms Graphically Illustrate The Danger Of Punitive Damages Imposed On The Basis Of Vicarious Liability*

Clients and the public rely on independent auditors for the exercise of disinterested professional judgment in the examination of client financial statements. To fulfill that expectation, amici have become the very large and complex professional organizations already described; large corporations require large accounting firms to undertake the massive task of auditing their financial statements. Importantly, however, the size of firms such as amici permits them to maintain a highly diversified client base that serves to enhance audit quality and the maintenance of professional independence from even the largest of their clients. See Fischel, *The Regulation of Accounting: Some Economic Issues*, 52 Brooklyn L. Rev. 1051, 1052-1053 (1987); Ricardo-Campbell, *Comments on the Structure of Ownership and the Theory of the Firm*, 26 J.L. Econ. 391, 392 (1983).

In addition, public accounting, like law, is a profession in which the needs of clients are met through the judgment and personal services of a team of professionals. Contrary to the common belief of the public—and of juries—the work of an accountant is not at all mechanical. “Instead, modern audits of complex enterprises require accountants to make numerous judgments about the proper characterizations of the data and the reliability of the client’s accounting systems.” Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 Mich. L. Rev. 1929, 1962 n.158 (1988). Familiarity with the details of the client’s business and transactions is integral to these daily judgments, which therefore must generally be made on a decentralized basis by the accounting professionals involved in the engagement who have gained that familiarity (see Fama & Jensen, *Agency Problems and Residual Claims*, 26 J.L. Econ. 327, 334 (1983))—often unavoidably “by rela-

tively junior members of the accountant’s staff.” Siliciano, *supra*, 86 Mich. L. Rev. at 1962 n.158.

Thus, the size of the organizations necessary for amici to satisfy clients and the public, combined with the unavoidable necessity for discretionary decisions by thousands of professionals practicing throughout the country, makes the threat of unwarranted vicarious punitive liability against large public accounting firms especially acute. That threat may become reality in two kinds of situations. First, there is the extremely rare but nonetheless grave occurrence of altogether wayward conduct by an accounting professional based on venal personal motives. A notorious example of this type of problem is the exchange of falsifications and bribes between a partner of the accounting firm of Alexander Grant & Co. and E.S.M. Group.¹¹ In general, there is little that accounting firms can do to prevent that sort of aberrational conduct, and punitive damages assessed against a firm in such circumstances obviously do not further the purposes of punishment and deterrence. Instead, the appropriate response is the invocation of the criminal process in appropriate cases.¹²

¹¹ See Petition for Writ of Certiorari at 25a-26a in *Peat Marwick Main & Co. v. Tew*, No. 87-1727, cert. denied, 486 U.S. 1055 (1988). The Alexander Grant partner pleaded guilty to criminal charges of larceny and grand theft brought against him by the State of Ohio for his role in the E.S.M. fraud.

¹² There have been instances in which individual members of amici’s firms have been subjected to indictment and trial on criminal charges. See *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969) (two partners and a senior manager were convicted (but later pardoned) of conspiracy to commit mail fraud and to certify a false and misleading financial statement for Continental Vending Corporation), cert. denied, 397 U.S. 1006 (1970); *United States v. Clark*, 360 F. Supp. 936 (S.D.N.Y.) (preliminary ruling on criminal actions against three accountants alleging securities law violations in connection with financial statements of Four Seasons Nursing Home Centers; two of the accountants were acquitted and charges against the third were dropped following a hung jury),

A second problem facing firms such as amici, which is much more frequent if less dramatic than the first, arises from the fact that juries often tend to assume that a diligent, careful accountant should never make a mistake in his work. Cf. R. Gormley, *The Law of Accountants and Auditors* ¶¶ 1.06, 1.07 (1981) (noting common misperceptions among the general public concerning the role of the independent auditor). Indeed, juries sometimes view the routine mistakes of accountants as reckless or even intentional acts. See generally *In re Paris Air Crash*, 662 F.2d 1315, 1323 (9th Cir.) (Kennedy, J.) (noting "the temptation for a jury to award punitive damages even when concrete elements of fraudulent or intentional wrongdoing are absent"), cert. denied, 449 U.S. 976 (1980).

For example, a Florida jury in 1984 awarded more than \$2 million in punitive damages to E.S.M. Group—before the revelation that E.S.M. was permeated by fraud—against Peat Marwick Mitchell & Co. (predecessor to amicus KPMG Peat Marwick) for "gross negligence amounting to fraud," based on the professional decision of two partners in one of Peat Marwick's Florida offices as to the form of a report to be rendered on the client's financial statements. Similarly, a Mississippi jury awarded \$500,000 in punitive damages against Touche Ross & Company (predecessor to amicus Deloitte & Touche) based on the jury's conclusion that personnel in the firm's Jackson office had been grossly negligent in their audit of a client's financial statements, even though the alleged negligence amounted to no more than a disagreement over the requirements of generally accepted accounting principles (GAAP) and generally accepted au-

mandamus denied, 481 F.2d 276 (2d Cir. 1973); *United States v. Natelli*, 527 F.2d 311 (2d Cir. 1975) (a partner was convicted (but later pardoned) of making false statements in the 1969 National Student Marketing proxy statement), cert. denied, 425 U.S. 934 (1976).

ditig standards (GAAS).¹³ In each of those cases, the local partners were engaging in the kind of discretionary decisionmaking that accountants must make constantly, and in which misjudgments—or what someone perceives to be misjudgments—unavoidably will occur.

It was plainly senseless—and a violation of due process—to visit "punishment" and "deterrence" upon the thousands of partners in Peat Marwick's or Touche Ross's other offices who knew nothing of the Florida or Mississippi partners' actions. Punitive damage awards in these circumstances completely contradict the purposes that supposedly justify their existence.¹⁴ The conduct of a member of the professional staff who may himself be liable for punitive damages will be in many instances conduct that the *firm* could not have prevented. There obviously are inherent limits to the ability of any firm to prevent errors that juries might later find egregious enough to justify punitive liability. See Note, *supra*, 70 Yale L.J. at 1304. These limitations necessarily dictate, as a matter of due process, that punitive damages not be visited on those who could not prevent the misconduct.

Moreover, the problem of vicarious liability for punitive damages is compounded for amici by the fact that they are organized as professional partnerships. Vicarious punitive awards put every one of amici's thousands of partners personally at risk for punitive liability based on alleged torts committed by other partners or employees in one of the firms' hundreds of offices in which they conduct their far-flung operations—torts of which the

¹³ The punitive award against Touche Ross was later set aside when the entire judgment was reversed on other grounds. *Touche Ross & Co. v. Commercial Union Ins. Co.*, 514 So. 2d 315 (Miss. 1987).

¹⁴ See Morris, *supra*, 44 Harv. L. Rev. at 1204 ("One would expect to find that partners are not liable in punitive damages for torts committed by their copartners. Certainly one partner does not have much power to punish the other. But such does not seem to be the universally accepted law.").

partners may know nothing and about which the partners may be able to do nothing. See *Meleski v. Finero Int'l Restaurant, Inc.*, 47 Md. App. 526, 424 A.2d 784, 790-793 (1981) (affirming joint and several punitive awards against partners without regard to whether the partners had authorized, ratified, or participated in the tort); see also *Hatrock*, 750 F.2d at 771, 773 n.3 (affirming jury's punitive award against brokerage firm based on tort of limited partner in one of its more than 500 one-person offices even though jury found that brokerage firm had properly supervised its staff).

Consider the personal joint and several liability for a punitive damage award of each of the 140 partners in a hypothetical multi-city law firm attributable to the professional malpractice of one of the firm's 200 associates in one of its six offices who neglected to file a client's complaint until after the statute of limitations had run. It is simply irrational to suggest that each of the partners should be subjected to vicarious punitive liability for the tort of an associate for his work on a matter of which most of them would and could know nothing. Multiply the numbers in this hypothetical more than ten times over, and the risk faced on average by each of the partners in amici's firms becomes clear. In short, amici practice their profession in an environment in which the imposition of vicarious punitive liability for the individual torts of members or employees of the firm is the most egregious sort of punishment-without-fault, and constitutionally impermissible.

4. *The Imposition Of Vicarious Punitive Liability On Professional Service Firms Is Not Necessary To Further The Deterrent Purpose Of Punitive Damages*

Amici already face powerful incentives to do all within their power to attempt to ensure that they will not fall short of the highest professional standards. These incentives include the preservation and enhancement of their professional reputations, which are a critical part of what

amici offer clients (see Fischel, *supra*, 52 Brooklyn L. Rev. at 1052; Note, *supra*, 5 Yale L. & Pol'y Rev. at 525 & nn.51-53), and the exposure to liability for compensatory damages. See *id.* at 525 & n.55; *Smith v. Wade*, 461 U.S. at 50 (noting deterrent effect of compensatory liability); Note, *supra*, 70 Yale L.J. at 1306 (same).¹⁵

Accounting firms in general and amici in particular therefore do a great deal to guard against inadequate professional performance. The accounting profession has long imposed on itself an extensive system of self-regulation and monitoring to ensure the maintenance of the highest professional standards. The American Institute of Certified Public Accountants (AICPA), of which the individual CPAs affiliated with amici are members, promulgates numerous binding rules of conduct for auditing and other aspects of the profession, including a detailed set of requirements for quality control programs by accounting firms.¹⁶ In addition, membership in the SEC Practice Section of the AICPA requires accounting firms to undergo peer reviews and continuing education.¹⁷

¹⁵ In addition to the deterrent effect of compensatory awards, the transaction costs associated with defending against charges of liability provide yet another deterrent to culpable conduct. In 1989, amici collectively incurred more than \$100 million in out-of-pocket defense costs. In addition, thousands of hours of professional time necessarily were diverted from the rendition of services to the defense of litigation.

¹⁶ See *System of Quality Control for a CPA Firm*, 2 AICPA Professional Standards (CCH) QC § 10.01 to QC § 10.10 (1979). Among other things, these standards require amici to implement procedures to enhance independence, supervision of professional staff, and professional development of staff (see *id.* § 10.07, at 17,061-17,063), as well as an annual inspection of the quality control procedures themselves (*id.* at 17,064; see also *id.* Interpretations of Quality Control Standards § 10-2.05, at 17,125-17,126).

¹⁷ The SEC Practice Section is composed of accountants engaged to examine the financial statements of public companies whose shares are registered with the SEC. The mandatory peer review takes place triennially, is done by a team of professionals from another member firm of the SEC Practice Section, is paid for by the

With this extensive system of mandatory self-regulation already in place to avoid professional misjudgments, vicarious liability for punitive damages is hardly required to serve the deterrent purpose of causing amici to initiate preventive measures. Because such awards are not rationally related to the deterrence of individual instances of professional misconduct, but rather constitute punishment of the innocent for the fault of others, they are a violation of due process.

II. THE CONSTITUTIONALLY PERMISSIBLE MEASUREMENT OF A PUNITIVE DAMAGE AWARD SHOULD NOT TURN SOLELY ON A MULTIPLE OF COMPENSATORY DAMAGES OR THE SIZE OF THE DEFENDANT

As petitioner and other amici explain in their briefs, the Due Process Clause requires both standards for the imposition of punitive damages and a rational relationship between the size of the award and the purposes of punitive damages—punishment and deterrence. No single factor will by itself protect against arbitrariness or establish that rational relationship, and there are thus a number of factors that may be considered together to produce a reasonable range of permissible punitive damage awards. The States are surely free to establish different formulas and standards, but the Fourteenth Amendment does operate as a *limitation* on the standards that the States may permissibly employ. Thus, we focus the discussion that follows primarily on some of the standards commonly employed by the States that, if applied in isolation, are most likely to produce unconstitutionally

firm undergoing review, and is extensive. See *SECPS Manual* §§ 1, 2 (AICPA Div. for CPA Firms, SEC Practice Section 1986). Membership in the SEC Practice Section also requires each professional staff member of a member firm to put in at least 120 hours every three years on continuing professional education in accounting and auditing. See *SECPS Manual* § 1, at 107. During 1989 alone, amici collectively spent far more than \$100 million on continuing education for their professional staff.

excessive punitive damage awards in violation of the Fourteenth Amendment.

A. A Numerical Ratio Between Compensatory Damages And Punitive Damages Cannot By Itself Ensure A Constitutionally Permissible Limit On The Size Of Punitive Damage Awards

It has sometimes been suggested that punitive awards should be set at some multiple of compensatory awards. That approach may work reasonably well in certain cases, but a mechanical rule that tests the excessiveness of punitive damages solely by reference to their numerical relationship to the compensatory award will inevitably produce unconstitutional results in certain categories of cases. This is so because the amount of actual damages incurred by a plaintiff has no necessary connection to either the gravity of the wrongful conduct of the defendant or the extent of the benefit obtained by the defendant as a result of the wrong. See *In re Paris Air Crash*, 622 F.2d at 1322. Indeed, it would be sheer fortuity if punitive damage awards that were determined only by reference to some multiple of compensatory damage awards resulted in constitutionally permissible awards.

The situations in which amici are exposed to tort liability provide a clear illustration of the constitutional infirmity in any rule that looks solely to a numerical ratio between compensatory damages and punitive damages. Very large investments and business transactions such as mergers and acquisitions often hinge on the financial condition of the companies whose financial statements amici are called on by clients to examine. When these transactions go "sour," amici frequently are the only defendants with sufficient assets to satisfy claims made by disappointed investors or creditors. Thus, amici find themselves subject to potentially very large compensatory awards even though any culpability on their part is almost always many orders of magnitude less than that of others involved in a particular transaction. The sheer size of the underlying investment or transaction under-

taken by the client typically means that the amount of compensatory damages assessed against amici for economic loss may be in the millions of dollars.¹⁸

Such large compensatory damages are altogether disproportionate to the gravity of the alleged wrong of the accountant—a wrong that, as previously described, may be no more than a professional misjudgment later found by a jury to have been “intentional,” “reckless,” or “grossly” negligent. A multi-million-dollar compensatory award for such a misjudgment therefore already levies very substantial punishment and deterrence on the accounting firm. See *Smith v. Wade*, 461 U.S. at 50 (exposure to compensatory liability deters potential tortfeasors). In these circumstances the rote application of a prescribed multiple of compensatory damages cannot produce a constitutionally permissible measurement of punitive damage awards.

Likewise, the very large compensatory damages to which amici are exposed are out of all proportion to the benefit an accounting firm might gain as a result of the wrong committed. Amici do not partake of the enormous economic gains shared by their clients and their clients’ investment advisors; at most, the “benefit” that amici

¹⁸ See, e.g., *Westmont Tractor Co. v. Touche Ross & Co.*, No. 87-4242 (9th Cir. 1988) (\$5 million in compensatory damages); *Manufacturers Hanover Trust Co. v. Arthur Andersen & Co.*, No. 82-CIV-6622 (S.D.N.Y. 1988) (\$17 million in compensatory damages); *Scioto Memorial Hospital Ass’n v. Price Waterhouse*, No. 85CV-08-4513 (Ct. Common Pleas, Franklin Cty., Ohio 1988) (post-trial motion pending) (\$15.8 million in compensatory damages); *The Billings Clinic v. Peat Marwick Main & Co.*, No. DV-85-2687 (13th Judicial Dist., Yellowstone Cty., Mont. 1988) (\$3.3 million in compensatory damages), appeal pending, No. 88-623 (Mont.); *In re Osborne Securities Cases*, Coordination Proceeding No. 1805 (Santa Clara Cty., Cal. 1987) (\$4.2 million in compensatory damages assessed against Arthur Young & Company, predecessor to amicus Ernst & Young), appeal pending, No. H003695 (Cal. App.) (argued April 24, 1990); *First Small Business Inv. Co. v. Butler, Binion, Rice & Knapp*, No. H-84-3276 (S.D. Tex. 1987), and *Republic Venture Group, Inc. v. Butler, Binion, Rice & Knapp*, No. H-85-3528

could expect to gain from any misconduct would be limited to the relatively modest income they receive from the particular professional services at issue. Thus, in the vast majority of cases confronted by amici, measuring punitive damage awards by reference to a multiple of compensatory damages can only produce an unconstitutionally excessive award.¹⁹

B. The Size Of A Punitive Damage Award Cannot Be Justified Solely By Reference To The Size Of An Institutional Defendant

The size of a firm also cannot serve as the sole factor justifying the amount of an award of punitive damages. If the size of an institutional defendant, standing alone, were a sufficient benchmark to insulate a punitive damage award from constitutional attack, then the totality of the constitutional standard would perversely turn on who or what the defendant is rather than what the defendant did. Such a rule would transform the award of punitive damages into a game of “pin the tail on the biggest donkey” that can have no place in any rational system of punishment and deterrence. The size of the defendant, viewed without reference to the conduct of the defendant, is a wholly irrational basis upon which to analyze the degree of proportionality between the punishment and what is to be punished. Moreover, the manifest dangers of prejudice and arbitrariness once the jury is presented

(S.D. Tex. 1987) (approximately \$5 million in compensatory damages assessed against amicus Coopers & Lybrand), rev’d as time barred, No. 85-6167 (5th Cir. May 9, 1990).

¹⁹ Our analysis in no way suggests that the *statutory* multiplication of compensatory damages is illegitimate. See, e.g., 15 U.S.C. § 15 (treble damages for antitrust violations). This distinction derives from fundamental differences between juries and legislatures. A jury does not have the ability of a legislature to make detailed factual investigations to determine a rational way to fix damages on the average for a particular class of cases. Moreover, unlike a legislature, a civil jury is an *ad hoc* body that exists only for the purpose of deciding a particular private dispute; it has neither the breadth of perspective nor the public accountability of a legislature. See also note 7, *supra*.

with evidence of the defendant's size, fully set out in the briefs of petitioner and other amici, counsel in favor of tight restrictions on the jury's ability to consider that factor at all.

In the case of economic torts committed by defendants organized to produce an economic profit, such as petitioner and amici, the States may most easily serve the purpose of punitive damages and arrive at constitutionally proportionate punitive awards by setting the ceiling on the size of punitive awards with reference to the amount of the economic benefit the defendant gained or expected to gain from the commission of the tort. See, e.g., *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1080-1081 (Ariz.) (noting the relevance to the excessiveness inquiry of "the profitability of the defendant's [wrongful] conduct"), cert. denied, 484 U.S. 874 (1987). A measure based primarily on the profit to be gained from the wrong ties the size of the punitive award to the motivation the intentional or reckless indulgence of which caused the economic actor to commit the tort; this is the motivation whose exercise a punitive award is intended to punish and deter.

For amici, as previously explained, the benefit to be realized by tortious misconduct must be measured with reference to the actual or expected economic gain that a firm hoped to realize for its professional services. See pp. 27-28, *supra*. Similarly, the Alabama Supreme Court in this case should have considered the fact that petitioner stood to gain *absolutely nothing* by Ruffin's misconduct. Had the court done so, it would have been readily apparent that a punitive award of more than \$1 million bore no rational relationship to petitioner's economic expectations and was far in excess of any amount necessary to satisfy the goals of punishment and deterrence.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

Of Counsel:

JON N. EKDAHL

General Counsel

Arthur Andersen & Co.

69 W. Washington Street

Chicago, Illinois 60602

HARRIS J. AMHOWITZ

General Counsel

Coopers & Lybrand

1251 Avenue of the Americas

New York, New York 10020

HOWARD J. KRONGARD

General Counsel

Deloitte & Touche

1633 Broadway

New York, New York 10019

CARL D. LIGGIO

General Counsel

Ernst & Young

277 Park Avenue

New York, New York 10172

ELDON OLSON

General Counsel

Price Waterhouse

1251 Avenue of the Americas

New York, New York 10020

LEONARD P. NOVELLO *

General Counsel

KPMG Peat Marwick

767 Fifth Avenue

New York, New York 10153

(212) 909-5512

* *Counsel of Record*

June 1, 1990

(19)
No. 89-1279

Supreme
FILED
JUN 1 1989

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
v. *Petitioner,*

CLEOPATRA HASLIP, *et al.,*
Respondents.

On a Writ of Certiorari to the Supreme Court of Alabama

**BRIEF AMICI CURIAE FOR
THE ALLIANCE OF AMERICAN INSURERS,
THE AMERICAN COUNCIL OF LIFE INSURANCE,
THE AMERICAN INSURANCE ASSOCIATION,
THE HEALTH INSURANCE ASSOCIATION
OF AMERICA, AND THE NATIONAL ASSOCIATION
OF INDEPENDENT INSURERS
IN SUPPORT OF THE PETITIONER**

ERWIN N. GRISWOLD
(Counsel of Record)
PATRICIA A. DUNN
LAURIE W. FINNERAN
DEENA B. JENAB
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for the Amici

[Of Counsel Listed on Inside Cover]

Of Counsel:

KENNETH H. NAILS

JAMES H. BRADNER, JR.

RICHARD E. GOODMAN

MARY N. BELGRADE

Alliance of American Insurers

1501 Woodfield Road

Suite 400 West

Schaumburg, IL 60173-4980

(708) 330-8602

RICHARD E. BARNSBACK

PHILLIP E. STANO

American Council of Life Insurance

1001 Pennsylvania Avenue, N.W.

Washington, D.C. 20004-2599

(202) 624-2183

MICHAEL LOVENDUSKY

American Insurance Association

1130 Connecticut Avenue, N.W.

Suite 1000

Washington, D.C. 20036

(202) 828-7173

JOE W. PEEL

THERESA L. SOROTA

**Health Insurance Association
of America**

1025 Connecticut Avenue, N.W.

Suite 1200

Washington, D.C. 20036

(202) 223-7822

PATRICK J. McNALLY

JOHN J. NANGLE

**National Association of
Independent Insurers**

2600 River Road

4th Floor

Des Plaines, IL 60018

(708) 297-7800

QUESTION PRESENTED

Whether punitive damages awards imposed without meaningful standards and bearing no rational relationship to the purposes of deterrence and punishment are constitutionally excessive under the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTERESTS OF THE AMICI	1
STATEMENT	3
SUMMARY OF ARGUMENT	5
ARGUMENT	8
<div style="padding-left: 40px;"> JURY AWARDS OF PUNITIVE DAMAGES IM- POSED WITHOUT MEANINGFUL STANDARDS AND IN AMOUNTS BEARING NO RATIONAL RELATIONSHIP TO THE PURPOSES OF DE- TERRING AND PUNISHING A CIVIL DEFEND- ANT'S CONDUCT ARE CONSTITUTIONALLY EXCESSIVE UNDER THE DUE PROCESS CLAUSE </div>	8
<div style="padding-left: 40px;"> A. The Due Process Clause Requires a Substantive Limitation on the Amounts of Punitive Dam- ages That Civil Juries Can Award </div>	9
<div style="padding-left: 40px;"> B. Punitive Damages Awards Imposed Without Meaningful Standards and Exceeding Amounts Rationally Related to the Purposes of Deterrence and Punishment Are Constitutionally Excessive.. </div>	14
CONCLUSION	26

TABLE OF AUTHORITIES

Cases	Page
<i>Aetna Life Insurance Co. v. Lavoie</i> , 475 U.S. 813 (1986)	3
<i>Bankers Life & Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988)	3, 13
<i>Benson v. Frederick</i> , 97 Eng. Rep. 1130 (1766)	10
<i>Browning-Ferris Industries v. Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989)	passim
<i>CTS Corp. v. Dynamics Corp. of America</i> , 481 U.S. 69 (1987)	24
<i>Chicago, Burlington & Quincy R.R. v. Chicago</i> , 166 U.S. 226 (1897)	11
<i>City of New Orleans v. Dukes</i> , 427 U.S. 297 (1976)	14
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	18, 21, 25
<i>Coryell v. Colbaugh</i> , 1 N.J. (Coxe) 77 (1791)	10
<i>Davidson v. City of New Orleans</i> , 96 U.S. 97 (1878)	11
<i>Day v. Woodworth</i> , 54 U.S. (13 How.) 363 (1851) ..	5, 10, 11
<i>Douglass v. Hustler Magazine, Inc.</i> , 769 F.2d 1128 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986)	19
<i>Duke Power Co. v. Carolina Environmental Study Group, Inc.</i> , 438 U.S. 59 (1978)	14
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	22
<i>Gertz v. Welch</i> , 418 U.S. 323 (1974)	11
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	15
<i>Hammond v. City of Gadsden</i> , 493 So. 2d 1374 (Ala. 1986)	4
<i>International Brotherhood of Electrical Workers v. Foust</i> , 442 U.S. 42 (1979)	18
<i>Kennon v. Gilmer</i> , 131 U.S. 22 (1889)	10
<i>Lassiter v. Department of Social Services</i> , 452 U.S. 18 (1981)	14
<i>Linn v. United Plant Guard Workers, Local 114</i> , 383 U.S. 53 (1966)	17
<i>Linsley v. Bushnell</i> , 15 Conn. 225 (1842)	10
<i>Meagher v. Driscoll</i> , 99 Mass. 281 (1868)	10

TABLE OF AUTHORITIES—Continued

	Page
<i>Memphis Community School District v. Stachura</i> , 477 U.S. 299 (1986)	11
<i>Milwaukee & St. Paul Ry. v. Arms</i> , 91 U.S. 489 (1876)	11
<i>Missouri Pacific Ry. v. Humes</i> , 115 U.S. 512 (1885)	12, 18
<i>Missouri Pacific Ry. v. Tucker</i> , 230 U.S. 340 (1913)	8, 12, 13, 23
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977)	14
<i>Schware v. Board of Bar Examiners</i> , 353 U.S. 232 (1957)	14
<i>Slaughter House Cases</i> , 83 U.S. (16 Wall.) 36 (1873)	11
<i>Solem v. Helm</i> , 463 U.S. 277 (1983)	15, 22
<i>St. Louis, Iron Mountain & Southern Ry. v. Williams</i> , 251 U.S. 63 (1919)	12, 16, 18, 22
<i>Sweet v. Rechel</i> , 159 U.S. 380 (1895)	11
<i>Tull v. United States</i> , 481 U.S. 412 (1987)	17
<i>Tullidge v. Wade</i> , 95 Eng. Rep. 909 (1769)	10
<i>United States v. Halper</i> , 109 S. Ct. 1892 (1989)	22
<i>United States v. United Mine Workers</i> , 330 U.S. 258 (1947)	18
<i>Waters-Pierce Oil Co. v. Texas</i> , 212 U.S. 86 (1909)	passim
<i>Weems v. United States</i> , 217 U.S. 349 (1910)	15, 22, 24
<i>Wilkes v. Wood</i> , 98 Eng. Rep. 489 (1763)	9
<i>Williamson v. Lee Optical</i> , 348 U.S. 483 (1955)	14

Statutes

Ala. Code § 6-11-20 (1989)	24
Ala. Code § 6-11-21 (1989)	24
Ala. Code § 6-11-23 (1989)	24
Ala. Code § 27-1-12 (1986)	25
Ala. Code § 27-12-17 (1986)	25
Ala. Code § 27-12-23 (1986)	25
Colo. Rev. Stat. § 13-21-102 (1987)	23
Fla. Stat. Ann. § 768.73 (1) (West Supp. 1990)	23

TABLE OF AUTHORITIES—Continued

	Page
Nev. Rev. Stat. § 42.005 (Supp. 1989)	23
Tex. Code Ann. §§ 41.007 <i>et seq.</i> (Vernon Supp. 1990)	23
<i>Miscellaneous</i>	
American College of Trial Lawyers, <i>Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice</i> (1989)	9, 18, 21-23
Dobbs, <i>Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies</i> , 40 Ala. L. Rev. 831 (1989)	19, 20
Ellis, <i>Fairness and Efficiency in the Law of Punitive Damages</i> , 56 S. Cal. Rev. 1 (1982)	22
J. Ghiardi & J. Kircher, <i>Punitive Damages Law and Practice</i> § 4.14 (1981)	11
1 L. Schlueter & K. Redden, <i>Punitive Damages</i> § 1.4(A) (1989)	10
Mallor & Roberts, <i>Punitive Damages: Toward a Principled Approach</i> , 31 Hastings L. J. 639 (1980)	20
Massey, <i>The Excessive Fines Clause and Punitive Damages: Some Lessons From History</i> , 40 Vand. L. Rev. 1233 (1987)	23
Morris, <i>Punitive Damages in Tort Cases</i> , 44 Harv. L. Rev. 1173 (1931)	17
Note, <i>Exemplary Damages in the Law of Torts</i> , 70 Harv. L. Rev. 517 (1957)	10
Note, <i>The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages</i> , 41 N.Y.U. L. Rev. 1158 (1966)	10
Owen, <i>Punitive Damages in Products Liability Litigation</i> , 74 Mich. L. Rev. 1258 (1976)	16, 19, 20, 21
Restatement (Second) of Torts § 908(1) (1979)	11

TABLE OF AUTHORITIES—Continued

	Page
Sales & Cole, <i>Punitive Damages: A Relic That Has Outlived Its Origins</i> , 37 Vand. L. Rev. 1117 (1984)	10, 11, 16
Schwartz, <i>Browning-Ferris: The Supreme Court's Emerging Majorities</i> , 40 Ala. L. Rev. 1237 (1989)	20
Schwartz, <i>Deterrence and Punishment in the Common Law of Punitive Damages: A Comment</i> , 56 S. Cal. L. Rev. 133 (1982)	16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On a Writ of Certiorari to the Supreme Court of Alabama

**BRIEF AMICI CURIAE FOR
THE ALLIANCE OF AMERICAN INSURERS,
THE AMERICAN COUNCIL OF LIFE INSURANCE,
THE AMERICAN INSURANCE ASSOCIATION,
THE HEALTH INSURANCE ASSOCIATION
OF AMERICA, AND THE NATIONAL ASSOCIATION
OF INDEPENDENT INSURERS
IN SUPPORT OF THE PETITIONER**

This brief deals with the constitutionality of punitive damages as applied in this case.

INTERESTS OF THE AMICI ¹

The *amici* are trade associations representing the interests of many of the life, health, and property and casualty insurers in the United States. Specifically, the

¹ Counsel for both the Petitioner and the Respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

Alliance of American Insurers represents approximately 180 insurance companies that write property and casualty insurance nationwide, with annual premiums representing over ten percent of such insurance. The American Council of Life Insurance, the largest life insurance trade association in the United States, represents the interests of 616 member life insurance companies; these companies currently underwrite 95 percent of the life insurance in force in legal reserve life insurance companies in the United States. The American Insurance Association represents 195 property and casualty insurers; these companies are affiliated with 65,000 independent insurance agents nationwide. The Health Insurance Association of America represents the interests of 320 member companies that provide health insurance to over 90 million Americans. The National Association of Independent Insurers, the largest association of property and casualty insurers in the country, represents over 560 property and casualty insurers writing over one-third of the personal lines of insurance sold in the United States.

Whether, and to what extent, the Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limitations on punitive damages are issues of vital importance to the *amici's* members. In recent years, courts have permitted juries to assess substantial punitive damages awards against insurers, in the absence of due process constraints, and have deferred to those awards even though they are imposed without meaningful standards and bear no rational relationship to the purposes of punishment and deterrence. These decisions drastically and unpredictably enlarge the risks facing insurers, which must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance. Because of their genuine interest in the constitutionality of current punitive damages law, therefore, the *amici* have filed briefs in this Court in prior cases involving this is-

sue. See, e.g., *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

This brief makes available to the Court the views of the *amici*, based on the experiences of their broad-based constituencies, on one of the issues in this case: whether punitive damages awards imposed without meaningful standards and bearing no rational relationship to the purposes of deterrence and punishment are constitutionally excessive under the Due Process Clause of the Fourteenth Amendment.²

STATEMENT

1. The facts, which Petitioner sets forth fully in its brief, are straightforward. Pacific Mutual Life Insurance Company ("Pacific Mutual") provides life, but not health, insurance to employees of Alabama municipalities (Pet. App. B2). In 1981, Lemmie Ruffin, a non-exclusive insurance broker, approached Roosevelt City and offered to provide health and life insurance to its employees (*id.* at B1-B2). Ruffin represented that he was "with Pacific Mutual" and submitted an insurance proposal on Pacific Mutual letterhead (*id.* at B2). In August 1981, when the City accepted Ruffin's proposal, Ruffin placed the employees' life insurance with Pacific Mutual and their health insurance with Union Fidelity Life Insurance Company ("Union Fidelity") (*id.*). Although Ruffin personally collected the City's premiums (*id.*), he did not forward them to either Pacific Mutual or Union Fidelity (*id.* at B3). In late 1981, the insurers cancelled the policies for nonpayment of premiums (*id.* at B2-B3).

² Though the *amici* agree with the Petitioner and its other *amici* that current punitive damages law raises substantial procedural due process concerns and urge the Court to impose limits on jury discretion to award these damages, this brief addresses only the constitutionality of excessive punitive damages awards under substantive due process principles.

2. Cleopatra Haslip, a City employee, thus had no health insurance when, in January 1982, she incurred \$2,500 in hospital and medical expenses (Pet. App. B3). Haslip and three other City employees then sued Pacific Mutual and Ruffin in Alabama state court for fraud (*id.*). In August 1987, the jury returned a verdict for the plaintiffs (*id.*). Its verdict gave Haslip, in particular, \$1,040,000 in compensatory and punitive damages (*id.*).³

3. The trial court denied Pacific Mutual's motion for a new trial or for judgment notwithstanding the verdict (Pet. App. A1). It concluded that the jury properly found that, under the doctrine of *respondeat superior*, Pacific Mutual was liable for Ruffin's fraud (*id.* at A7-A8). The court further concluded that the jury properly awarded punitive damages and declined to order a remittitur (*id.* at A12). Noting that the Alabama Supreme Court had outlined procedures for review of jury verdicts in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986),⁴ it sustained the verdict because (1) "the conduct in this case evidenced intentional malicious, gross, or oppressive fraud" (*id.* at A14), (2) the award was not excessive, even though it was "for a great amount of money" and the court "would in all likelihood have rendered a less[er] amount" (*id.* at A15), and (3) the verdict was not based on "bias, passion, corruption, or other improper motive" (*id.*).

³ The jury did not indicate what portion of this damages award represented punitive damages. Counsel for Respondent, however, has consistently argued that this case involves an award of punitive damages that exceeds \$1 million. See Pet. Reply Br. at App. C.

⁴ The *Hammond* decision requires trial courts to state for the record their findings of fact and conclusions of law regarding the excessiveness of jury awards and permits them to hold a post-trial, evidentiary hearing on that issue. *Id.* at 1379. *Hammond* further suggests that, in making this assessment, the court can consider such factors as the defendant's culpability, the need for deterrence and the impact of the award on the parties. *Id.*

4. The Alabama Supreme Court affirmed. It agreed with the trial court that Pacific Mutual was liable for Ruffin's fraud (Pet. App. B8-B9) and sustained the punitive damages award (*id.* at B12-B13). The court rejected Pacific Mutual's arguments that the award was unconstitutional, noting that the trial court had followed the *Hammond* "guidelines" for evaluating jury verdicts (*id.* at B12-B13). Because "jury verdicts are presumed correct" (*id.*), the court affirmed the jury's award.

Two justices dissented from the majority's constitutional analysis. In their view, "the award of punitive damages in this case violate[d] [Pacific Mutual's] due process rights under the Fourteenth Amendment" (Pet. App. B16).

SUMMARY OF ARGUMENT

A. The Due Process Clause imposes substantive limits on the amounts of punitive damages that civil juries can award. This conclusion is evident from history. This Court's decision in *Day v. Woodward*, 54 U.S. (13 How.) 363 (1851), which clarified the early judicial confusion concerning the functions of punitive damages, and the subsequent adoption of the Fourteenth Amendment in 1866, which permitted federal courts to review state action under due process principles, laid the groundwork for substantive review of the amounts of extra-compensatory damages. Nearly a century ago, therefore, this Court began to review extra-compensatory damages in light of their deterrent and punitive purposes to determine whether they were so "grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909). Although the Court upheld many, but not all, of these extra-compensatory awards under this constitutional excessiveness test, it did so largely because juries rendered these awards within legislatively-prescribed bounds and, accordingly, deserved deference. Substantive review of the amounts of punitive damages awards, with due re-

gard for legislative competence and the dual purposes of these awards, thus finds historical support in this Court's due process decisions.

B. The conclusion that the Due Process Clause limits excessive punitive damages awards requires a second, more difficult, inquiry into the appropriate method for evaluating punitive damages under substantive due process principles. This Court's decisions provide ample guidance here. They demonstrate that determining whether punitive damages are constitutionally excessive involves an evaluation of both the competence of the institution that awards punitive damages and the rationality of these awards in light of their purposes.

1. The level of scrutiny of punitive damages awards under the Due Process Clause should depend, in part, on whether the jury rendering the award did so within meaningful legislative bounds. This Court has made clear that the states' reasoned legislative choices deserve considerable judicial deference. This is so because politically accountable legislatures are well suited to the task of advancing a state's legitimate punitive and deterrent goals. To the extent that civil juries award extra-compensatory damages within such a legislative framework, therefore, those awards serve to enforce state legislative choices and thus embody an institutional legitimacy warranting some deference. But jury awards rendered in the absence of such legislative guidance have no comparable institutional legitimacy; juries merely examine isolated facts relating to a specific past incident and thus are unlikely to provide an award that will serve the states' broad forward-looking policy goals. Such unbridled jury awards are thus not entitled to any particular deference.

2. Jury awards of punitive damages that bear a rational relationship to the states' legitimate goals of deterrence and punishment may meet the due process test notwithstanding the absence of any legislative guidance. This Court's decisions to sustain extra-compensatory dam-

ages where they serve, in particular, the deterrent function of these damages support this conclusion. Whether such awards are constitutionally excessive thus should turn, in the first instance, on whether the award rationally serves its deterrent purpose. To this end, courts may evaluate the jury's award for excessiveness using the amount of a defendant's gain from his misdeeds and, in some cases, the plaintiff's reasonable litigation costs as appropriate objective indicia of a rational deterrence-based award.

This deterrence-based measure may, in some cases, underserve or overserve the second function of these damages, i.e., punishment. In such cases, courts can adjust the deterrence-based award to a level that rationally serves the punitive purposes as well. Courts may examine objective proportionality factors—whether a punitive damages award bears a rational relationship to a plaintiff's actual harm and whether the award exceeds criminal or civil penalties for comparable conduct—in order to determine the appropriate “punitive” adjustment to the deterrence-based measure. This purpose-oriented analysis ensures that, consistent with the Court's substantive due process principles, extra-compensatory awards will bear a rational relationship to their purposes, without violating the constitutional rule against excessiveness.

3. This analysis makes abundantly clear that the punitive damages award in this case, rendered in the absence of any legislative guidance, rationally serves neither purpose. It exceeds any objectively-based deterrence measure of punitive damages. And it greatly exceeds any amount that might fairly serve to “punish” Pacific Mutual for Ruffin's misdeeds. It is, therefore, constitutionally excessive.

ARGUMENT

JURY AWARDS OF PUNITIVE DAMAGES IMPOSED WITHOUT MEANINGFUL STANDARDS AND IN AMOUNTS BEARING NO RATIONAL RELATIONSHIP TO THE PURPOSES OF DETERRING AND PUNISHING A CIVIL DEFENDANT'S CONDUCT ARE CONSTITUTIONALLY EXCESSIVE UNDER THE DUE PROCESS CLAUSE

If the states had remained separately independent, their policies with respect to punitive damages would, of course, have been a purely local matter. But this is a federal nation, and the Fourteenth Amendment specifically imposes limits on state legislative and judicial actions. Where those actions exceed the limits of substantive due process, it is the responsibility of this Court to uphold the requirements of the Federal Constitution. This intervention is not unprecedented in this Court's decisions. *See, e.g., Missouri Pacific Ry v. Tucker*, 230 U.S. 340 (1913). Though it is obviously a difficult and delicate area—so that this Court's caution is fully understandable—only this Court can finally establish the limits that the Constitution places on punitive damages law.

This case clearly illustrates the need for the Court's oversight. Much more than in the nineteenth century, business transactions today are conducted on an interstate basis. The Petitioner here is a California company that carries on its insurance business nationwide. It is true that the injury for which the Respondents seek redress occurred in Alabama. As far as conventional damages are concerned, there is good reason to apply the law of Alabama, and no constitutional question is raised. With respect to punitive damages, though, the burden does not, as a practical matter, fall on the Petitioner, a mutual insurance company. Ultimately, the burden falls on all of the company's policyholders, residing all over the country, through its effect on dividends, and on future policyholders through its possible impact on premium rates.

Thus, the essential problem here is one of national scope, thoroughly appropriate for this Court's oversight. *See American College of Trial Lawyers, Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* (March 3, 1989) at 1-8 ("American College Report") (expressing serious concern with current punitive damages law and urging prompt action).⁵

This does not mean that the Court must review every decision that may arise with respect to state punitive damages law. Once this Court defines the substantive limitations that the Due Process Clause imposes on punitive damages, the states can be expected to apply those limits, subject only to eventual review here in presumably rare cases. This brief thus urges the Court, first, to hold that the Due Process Clause prohibits excessive punitive damages awards and, second, to articulate meaningful standards for determining when those awards exceed that constitutional limit.

A. The Due Process Clause Requires a Substantive Limitation on the Amounts of Punitive Damages That Civil Juries Can Award

1. Application of the Due Process Clause to punitive damages requires an examination of the basic purposes of the common law in allowing these damages and the role of the courts in reviewing these awards. In the early cases, English and American courts upheld jury awards of punitive damages without clearly identifying the underlying rationale for the awards. Although some courts justified punitive damages "as a punishment to the guilty, to deter from any such proceeding for the future" (*Wilkes v. Wood*, 98 Eng. Rep. 489, 498-99 (1763); *see*

⁵ For the Court's convenience, the *amici* attach copies of the *American College Report* to this brief.

also *Coryell v. Colbaugh*, 1 N.J. (Coxe) 77, 77-78 (1791)), other courts suggested that punitive damages also served the remedial purpose of compensating injured plaintiffs for intangible or dignitary harms that the law did not then recognize as compensable (see, e.g., *Tullidge v. Wade*, 95 Eng. Rep. 909 (1769); *Benson v. Frederick*, 97 Eng. Rep. 1130 (1766); *Meagher v. Driscoll*, 99 Mass. 281, 285 (1868); *Linsley v. Bushnell*, 15 Conn. 225, 235 (1842)).⁶ Because of the ill-defined and varying purposes of these damages, early courts had no clear standard for reviewing them and, as they were usually in modest amounts, found little reason to interfere with them.

Throughout the nineteenth century, the courts broadened the concept of actual damages to include various sorts of intangible harms. See, e.g., *Kennon v. Gilmer*, 131 U.S. 22, 26-27 (1889). As these damages began to fill the original compensatory function of punitive damages, the courts increasingly looked to non-compensatory justifications for punitive damages. See Note, *Exemplary Damages In The Law Of Torts*, 70 Harv. L. Rev. 517, 520 (1957); 1 L. Schlueter & K. Redden, *Punitive Damages* at § 1.4(A) (1989). Accordingly, in *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), this Court observed that “[i]t is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.” And, it added, “where the injury has been wanton and malicious, or gross and

⁶ See generally Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1120-23 (1984); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. Rev. 1158, 1159-61 (1966); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518-20 (1957) (commentary on the early courts’ vacillating explanations of the rationales for punitive damages).

outrageous, courts permit juries to add to the measured compensation of the plaintiff . . . something farther by way of punishment or example.” *Id.*

This Court’s decision in *Day*, and the subsequent adoption of the Fourteenth Amendment in 1866, marked important steps in punitive damages doctrine. The Court in *Day* clarified the purposes justifying punitive damages awards as deterrence and punishment, rather than compensation, thus facilitating future judicial review.⁷ The Fourteenth Amendment thereafter gave federal courts the responsibility to evaluate whether state actions actually served these purposes or, on the contrary, violated “due process of law.” The Fourteenth Amendment thus brought courts into the process of meaningful, purpose-based review of the amounts of extra-compensatory damages.⁸

In the early part of this century, the Court thus began to review extra-compensatory damages awards under the Fourteenth Amendment to determine whether they were

⁷ See also *Milwaukee & St. Paul Ry. v. Arms*, 91 U.S. 489, 492-93 (1876). The Court has continued to identify deterrence and punishment as the principal purposes underlying punitive damages, as have the great majority of jurisdictions. See *Gertz v. Welch*, 418 U.S. 323, 350 (1974); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2920 (1989); see also J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* at 4.14 (1981); Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. at 1126; Restatement (Second) of Torts § 908(1) (1979).

⁸ The Court initially moved slowly in its review of state decisions under the Fourteenth Amendment, clearly influenced by its concern that a broader approach would lead to undue federalizing of local law. See *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Davidson v. New Orleans*, 96 U.S. 97 (1878). The Court’s subsequent opinions in *Sweet v. Rechel*, 159 U.S. 380 (1895), and *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897), marked the end of its reluctance in this respect and the beginning of meaningful due process review.

so "grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909); see also *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, 351 (1913). Under the "gross excessiveness" test, the Court independently evaluated whether the awards properly served the purposes—and, in particular, the deterrent purpose—of these extra-compensatory damages. See *St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. 63, 67 (1919) (justifying penalty in light of "the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates"); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. at 111 (justifying large award because the defendant's illegal business "was very extensive and highly profitable"); *Missouri Pacific Ry. v. Humes*, 115 U.S. 512, 523 (1885) (noting that legislation served as "the most efficient mode of preventing . . . the commission of injuries" and as an important incentive for victims to seek redress). In this manner, the Court determined whether these awards were "wholly disproportioned to the offense and obviously unreasonable." *St. Louis Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 66-67.

Although the Court ultimately upheld many extra-compensatory awards under this "excessiveness" test, it did so largely because the statutes under which the juries acted fixed rational bounds and, accordingly, deserved deference. See *Missouri Pacific Ry. v. Humes*, 115 U.S. at 522 (noting that "the legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion"); see also *St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 66; *Waters-Pierce Oil Co. v. Texas*, 212 U.S. at 112. But not all awards survived this deferential review. In *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, for example, the Court struck down a jury award rendered pursuant to a state statute requiring railroad companies to pay \$500 in liquidated damages to any shippers whom they overcharged. In

declaring the damages award constitutionally excessive, the Court observed that the award was "grossly out of proportion to the possible actual damages" and "arbitrary and oppressive." *Id.* at 351.

2. That the Due Process Clause imposes substantive limitations on the amounts of extra-compensatory damages thus is well-grounded in this Court's decisions. While this Court has had no occasion to apply these principles to the punitive damages awards of civil juries in recent years, those decisions provide ample basis for holding that, with due regard for legislative competence and the dual purposes of these damages, the Due Process Clause prohibits excessive punitive damages awards. See *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909); *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340 (1913).

Several Justices of the Court have recently expressed the view that these awards should be evaluated under substantive due process principles. Justice Brennan, with whom Justice Marshall concurred, recently indicated agreement with the Court's past substantive review of extra-compensatory damages. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring). Justice O'Connor, with whom Justice Stevens and Justice Scalia have joined at various times, has likewise shown a concern for confining punitive damages within substantive limits. *Id.* at 2924 (O'Connor, Stevens, JJ., concurring in part and dissenting in part) (noting that the Court might consider "a due process challenge to awards of punitive damages or the method by which they are imposed"); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, Scalia, JJ., concurring in part and concurring in the judgment) (noting that state laws that allow juries to award any amount of punitive damages in certain tort cases "may violate the Due Process Clause").

To be sure, in recent decades, this Court has been restrained when considering state economic policy choices under substantive due process principles. But the Court has noted that, while the history of substantive due process review "counsels caution and restraint . . . [,] it does not counsel abandonment." *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977). Indeed, notwithstanding its restraint, the Court has steadfastly maintained that state action that is wholly arbitrary and irrational will not withstand due process scrutiny. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976) (per curiam); *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957); cf. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978) (due process review of congressional legislation). Punitive damages awards that bear no rational relationship to their purposes likewise cannot withstand that review.

B. Punitive Damages Awards Imposed Without Meaningful Standards and Exceeding Amounts Rationally Related to the Purposes of Deterrence and Punishment Are Constitutionally Excessive

The conclusion that the Due Process Clause of the Fourteenth Amendment encompasses a substantive rule against excessive punitive damages awards in civil cases does not end the inquiry. Rather, that conclusion necessarily leads to a more difficult examination of the contours of the substantive rule. While the Due Process Clause is not susceptible to rigid tests (see *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981)), this Court's substantive analysis of state laws under due process principles—reflecting both a deference to legislative choices and a requirement that the law meet its purposes—provides appropriate guidance here. Determining whether punitive damages awards are constitutionally excessive, therefore, requires an evaluation of (1) the competence of the institution that awards puni-

tive damages, and (2) the rationality of these awards in light of their purposes.

1. One factor in judicial scrutiny of punitive damages awards is the level of legislative guidance provided to the jury. While examination of punitive damages awards for excessiveness under due process principles counsels due regard for legislative choices, it requires no comparable deference to jury awards rendered in the absence of such guidance. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring).

The states plainly have legitimate interests in deterring and punishing certain misconduct against their citizens. When the states have acted to further these goals in their criminal statutes, therefore, this Court has recognized that the states' policy choices merit substantial deference:

'[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently moral values of the people.' The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'

Gregg v. Georgia, 428 U.S. 153, 175-76 (1976) (quotations omitted); see also *Solem v. Helm*, 463 U.S. 277, 290 (1983); *Weems v. United States*, 217 U.S. 349, 379 (1910).

When the states act to advance these same goals through their civil statutes, this Court has accorded similar deference to the states' legislative judgments, while recognizing that there are constitutional limits to legislative power. Thus, in reviewing an assessment of a civil statutory fine in *Waters-Pierce*, this Court stated:

The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police

power of the State. We can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law.

212 U.S. at 111; see also *St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 66. Both the deference and the limitation are appropriate. See Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133, 147 (1982).

Juries, however, do not speak with the same effect as democratically elected, politically accountable legislatures. When civil juries award punitive damages within a rational and appropriately limited legislative framework, those awards give effect to state legislative choices as to the amount of punitive damages that will appropriately serve the purposes of deterrence and punishment. See *Waters-Pierce Oil Co.*, 212 U.S. at 111. But jury awards of punitive damages rendered in the absence of such legislative guidance embody no such institutional legitimacy. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring). The jury, as an institution, is not particularly well-suited to making broad policy decisions and is not politically accountable for those decisions. Quite the contrary, juries face individualized facts and are particularly ill-equipped to take into account the broad impact of a punitive award on others and thus to determine when a penalty furthers the state's legitimate goals. See, e.g., Sales and Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. at 1159; Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1320-21 (1976).⁹

⁹ As Professor Clarence Morris so aptly explained almost sixty years ago:

In determining whether or not the defendant has been a 'reasonably prudent man' or an 'intentional wrongdoer,' the jury's task

Thus, while courts generally defer to the deliberative function of juries and to the verdicts that they reach, jury awards in civil cases are not inviolate. Indeed, this Court has noted, in another context, that "[i]f the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial." *Linn v. United Plant Guard Wkrs., Local 114*, 383 U.S. 53, 65-66 (1966) (emphasis added); see also *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. at 2921. Exercising that duty does not unduly interfere with a state's legitimate interest in deterrence and punishment. Rather, this judicial review merely recognizes the jury's lack of institutional competence in advancing these interests, through arbitrary punitive damages awards, and respects the role that courts must play in ensuring due process.¹⁰

2. Even in the absence of legislative guidance, punitive damages awards that bear a rational relationship to

is to reflect the social values of the community; the jury evaluates the defendant's past behavior, it determines whether or not his past conduct should be condemned. But in fixing the amount of punitive damages the considerations all look to the future conduct of the defendant and others; the question is: how large a judgment is needed to discourage this sort of conduct in the future? Evaluation of past conduct is a different type of problem from control of future behavior. It is evident that problems of social control may require more technical skill than jurymen have or can acquire. Probably, many on jury panels cannot think of punishment as a means to an end, as an expedient for reformation and deterrence, and only regard punishment as legal, justifiable revenge.

Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1179 (1931).

¹⁰ Judicial scrutiny of jury awards likewise does not interfere with the jury's function under the Seventh Amendment. Cf. *Tull v. United States*, 481 U.S. 412, 425, 427 (1987) (Seventh Amendment does not require a jury to determine the amount of the "remedy" in a civil case, and "a determination of a civil penalty is not an essential function of a jury trial").

the purposes of deterrence and punishment may not be so excessive and arbitrary as to deprive a defendant of due process of law. See *St. Louis, Iron & Mountain & So. Ry. v. Williams*, 251 U.S. at 67. By requiring courts to review whether certain amounts of punitive damages are rationally related to their purposes—and, in particular, the purpose of deterrence—this Court can provide a workable and appropriate test of excessiveness that will protect against arbitrary and irrational punitive damages awards. Cf. *United States v. United Mine Workers*, 330 U.S. 258, 303-05 (1947) (evaluating excessiveness of contempt fines in light of their purposes).¹¹

a. Examining the substantive contours of punitive damages law in light of its deterrent purpose is not a new concept. Nearly a century ago, this Court emphasized the deterrent function of extra-compensatory damages in reviewing them for “excessiveness” under the Due Process Clause. See *St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 67; *Waters-Pierce Oil Co. v. Texas*, 212 U.S. at 111; *Missouri Pacific Ry. v. Humes*, 115 U.S. at 523. More recently, this Court has given weight to this deterrent purpose in determining the availability of punitive damages in certain types of cases. The Court has found the risk of overdeterrence too great to justify awards of punitive damages against unions in “duty of fair representation” cases. See *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 51-52 (1979). And, recognizing deterrence as a major objective of both punitive damages law and section 1983, the Court has found that allowing these damages against municipalities, as opposed to individual officials, would not advance that purpose. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267-70 (1981). This

¹¹ Appropriate procedural safeguards, including precise and meaningful jury instructions, would undoubtedly go far toward the prevention of excessive punitive damages awards. See *American College Report* at 14. Those procedural issues, however, are beyond the scope of this brief.

Court's emphasis on the deterrent function of punitive damages thus provides an appropriate guide, in the first instance, for defining the scope of the constitutional rule against excessiveness: under a deterrence-based approach, an extra-compensatory award that exceeds an amount necessary to deter a defendant (and other potential defendants) from engaging in similar misconduct in the future is, in all likelihood, constitutionally excessive.

Assessing whether an award of punitive damages exceeds an amount necessary to deter a defendant should, in many cases, turn on relatively objective factors. See *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1145 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986) (focusing on deterrent function). The amount of a defendant's gain or profit from his misdeeds is an appropriate element in measuring deterrence. See Dobbs, *Ending Punishment In "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831 (1989); see also Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1286. The defendant's profits from his misconduct—or, in some cases, his expected profits—are objectively-based and often ascertainable without substantial difficulty. For example, an insurer that knowingly induces an individual to purchase a grossly inadequate policy for an unreasonable sum undoubtedly “profits” from the use of excess premiums that it improperly gained or, at least, stood to profit from those premiums over time. Removing the actual or expected gain in such a case, in addition to requiring the insurer to compensate the plaintiff for his actual losses, makes it less likely that the defendant will repeat the conduct. A gain-based measure of this sort sends a clear signal to defendants that such misdeeds do not pay and, thus, will often fully serve the deterrent function.¹²

¹² Significantly, this measure has nothing to do with the defendant's wealth—a factor that has served to inflate punitive damages awards against corporate “deep-pocket” defendants under the cur-

Of course, a "gain-based" measure of extra-compensatory damages may not always adequately serve this deterrent function. A defendant may, for example, escape effective deterrence when its conduct is rarely challenged in private litigation—i.e., when the cost of private enforcement exceeds the plaintiff's damages. See Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L. J. 639, 650 (1980); cf. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1285 (noting that the deterrent effect of punitive damages depends, in part, on "the manufacturer's perception of the likelihood of his being identified and punished"). In such a case, an appropriate measure of deterrence may include the plaintiff's reasonable litigation costs, to the extent not otherwise provided by statute. See Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. at 890-94. Shifting the plaintiff's reasonable litigation costs to the defendant in these types of cases could achieve appropriate deterrence by encouraging otherwise uneconomical litigation and, at the same time, removing the defendant's incentive to continue his misconduct. This measure, as with the gain-based measure, is relatively objective and, given the courts' experience with assessing attorneys' fees, hardly unfamiliar.

Evaluating the amounts of extra-compensatory damages based on these relatively objective measures thus achieves the deterrent function of these damages without a substantial risk of overdeterrence from grossly excessive

rent punitive damages system. Because a gain-based measure takes only profits from misconduct into account, how much money the defendant makes through lawful business efforts is entirely irrelevant. See Dobbs, *supra*, at 870-74; Schwartz, *Browning-Ferris: The Supreme Court's Emerging Majorities*, 40 Ala. L. Rev. 1237, 1253 (1989). Requiring a reviewing court (or, perhaps, the jury in the first instance) to focus on ill-gained profits—rather than a defendant's wealth—brings a measure of certainty and rationality to this area.

awards. This evaluation does not require a court to defer to the jury's subjective assessment of the amount necessary to deter future misconduct—a practice that has, in the past, led to gravely excessive punitive damages awards that bear no rational relationship to their purposes. See *American College Report* at 3 ("awards often bear no relation to deterrence and merely reflect a jury's . . . desire to punish"). Rather, it permits a court to review a jury's extra-compensatory award based on objective factors that serve to approximate what will adequately deter defendants from future misconduct within constitutional limits.

b. Deterrence, however, is not the sole function of punitive damages. This Court has made clear that they function as "punishment" as well. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. at 2920; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 266-67. While extra-compensatory damages based on a deterrence-based measure will often serve simultaneously to deter and punish, there may be cases in which such a measure underserves the punitive function—as, for example, where a defendant experiences or expects no gain from his misconduct. In such cases, adjusting an extra-compensatory award to serve its punitive purpose may be necessary. Cf. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1317 ("[t]he punishment function is the final factor to be considered in developing a standard for the measurement of punitive damages").¹³

¹³ There may also be cases where the deterrence-based measure overserves the punitive function, as, for example, where a defendant deserves no substantial punishment at all. Presumably, however, the substantive standards for assessing punitive damages will, in many cases, be high enough to ensure that a defendant not deserving punishment will not be held liable for such damages. To the extent that a jury nonetheless finds a defendant so liable and a deterrence-based measure supports an extra-compensatory award—as, for example, where the defendant (unknowingly) gains from an employee's

Whether a defendant “deserves” punishment beyond an amount necessary to deter his future misconduct turns on the gravity of his misdeeds. See Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 6 (1982). In the criminal context, this Court has resorted to several objective factors for determining whether punishment is disproportionate to the defendant’s conduct and thus unconstitutional under the Eighth Amendment. See *Solem v. Helm*, 463 U.S. 277, 290-91 (1983) (considering, among other things, the gravity of the offense and punishments for comparable conduct); see also *Enmund v. Florida*, 458 U.S. 782 (1982); *Weems v. United States*, 217 U.S. 349 (1910); cf. *United States v. Halper*, 109 S. Ct. 1892, 1901 (1989) (applying proportionality concept). This principle of proportionality—and the notion that objective factors can guide it—have force under the Due Process Clause as well. See *St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 66-67 (state legislative penalties can violate due process “where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable”). Whether an extra-compensatory award properly serves its “punitive” function, therefore, depends on whether it bears a rational relationship to the defendant’s conduct, measured with reference to such objective factors as the actual harm that the defendant’s conduct has caused and any legislative penalties for similar misconduct.

That a punitive award must bear some rational relationship to the plaintiff’s actual harm finds support in this Court’s precedents under the Due Process Clause. See

misconduct that is attributable to the employer under a theory of *respondeat superior*—this flexible purpose-based analysis permits a reviewing court to reduce any deterrence-based measure, if not eliminate a punitive damages award entirely, to reflect the absence of a need to “punish” the defendant. See *American College Report* at 16 (given the purposes of punitive damages, “there is no rational purpose in punishing or attempting to deter” if the person or entity did not engage in wrongful conduct).

Missouri Pacific Ry. v. Tucker, 230 U.S. at 351 (noting that liquidated damages award was “grossly out of proportion to the possible actual damages”). Though the Due Process Clause may not require punitive damages awards to represent exact multiples of actual or compensatory damages, punitive damages that are many times these damages raise, at a minimum, a serious concern that they overserve the punitive function. See *American College Report* at 14-15 (advocating limit on punitive damages award not to exceed the greater of an amount twice the compensatory award or \$250,000); cf. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 Vand. L. Rev. 1233, 1273 (1987) (“[a]n award of two to three times actual damages might be thought presumptively within the constitutional limits”). Several states have, therefore, enacted statutes that limit punitive damages awards to amounts that are some low multiple of the plaintiff’s actual damages, reflecting a reasoned judgment that any greater amount would not further the states’ legitimate interests. See, e.g., Colo. Rev. Stat. § 13-21-102 (1987); Fla. Stat. Ann. § 768.73(1) (West Supp. 1990); Nev. Rev. Stat. § 42.005 (Supp. 1989); Tex. Code Ann. §§ 41.007 *et seq.* (Vernon Supp. 1990). While there is no clear consensus on this point, it is reasonable to conclude that, as a general benchmark, an award within a relatively low multiple of actual damages would appear to give adequate recognition to the “punitive” function.

This “ratio” approach is only one objective benchmark for determining what amount of extra-compensatory damages will serve the punitive purpose. What is an appropriate punishment for a defendant’s misconduct may, in some cases, be apparent from legislative penalties for similar conduct. Many states have enacted statutes prescribing penalties, either civil or criminal, for certain intentional or negligent conduct that is similar to conduct that exposes a defendant to punitive damages. That legislative assessment concerning what “punishment” is appro-

priate, therefore, serves an important role in ascertaining whether an extra-compensatory award for comparable conduct not subject to the legislative penalty is rationally related to that purpose. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. at 2934 (O'Connor, Stevens, JJ., concurring in part and dissenting in part); cf. *Weems v. United States*, 217 U.S. at 380-81.

The *amici* recognize that "the Constitution does not require the States to subscribe to any particular economic theory." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987). These objective factors are thus only guides. But, when applied as a check against a deterrence-based measure of punitive damages, these factors should ensure that punitive damages, when warranted at all, adequately serve both their deterrent and punitive purposes, without violating the constitutional rule against excessiveness.

3. The punitive damages award in this case cannot stand under these principles. This case does not require the Court to review any legislative policy choice in Alabama concerning the appropriate measure of extra-compensatory damages.¹⁴ The award in this case reflects only the decision of an Alabama jury to assess, in the absence of any legislative guidance (and with very limited judicial guidance), a substantial punitive damages award against Pacific Mutual. Thus, contrary to the Alabama Supreme Court's conclusion that it had to "presume" that the jury's verdict was correct (Pet. App. at B13), the jury's award plainly did not deserve such substantial deference. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. at 2923 (Brennan, Marshall, JJ., concurring).

A purpose-based analysis of the jury's award of over \$1 million in punitive damages makes it equally plain that

¹⁴ Although the Alabama legislature has recently enacted a statute that places a \$250,000 "cap" on punitive damages awards in certain types of cases (see Ala. Code §§ 6-11-20, 11-21, 11-23 (1989)), it did so on June 11, 1987, after the cause of action arose in this case.

the award was constitutionally excessive. As an initial matter, the award greatly exceeds any deterrence-based measure of punitive damages. Pacific Mutual, after all, gained nothing from Ruffin's misconduct.¹⁵ Even assuming a risk of private underenforcement, moreover, it is doubtful that the plaintiffs' reasonable litigation costs were more than a small fraction of the jury's extra-compensatory award; this is not a complex case involving lengthy discovery or a lengthy trial.

In all events, a deterrence-based measure of extra-compensatory damages, based on the plaintiffs' reasonable litigation costs, would undoubtedly overserve the "punitive" function in this case. Pacific Mutual "deserved" no punishment for the fraudulent conduct of its non-exclusive agent; Pacific Mutual did not write the health insurance policy underlying this action, and it did not authorize or condone Ruffin's fraudulent acts in causing that policy to lapse. Reference to objective benchmarks for analyzing appropriate "punishment" under these circumstances only confirms that the substantial award of punitive damages against Pacific Mutual is excessive. The jury's \$1 million assessment bears no rational relationship to Haslip's actual damages; indeed, the award is over 400 times the \$2,500 in medical expenses that Haslip incurred. The award, moreover, is substantially in excess of the \$1,000 fine that the Alabama legislature has established for insurance fraud (Ala. Code §§ 27-1-12, 27-12-17, 27-12-23 (1986)).¹⁶

¹⁵ Assessing punitive damages against Ruffin under such a deterrence-based measure, by contrast, would be entirely rational. Requiring Ruffin to disgorge his ill-gained monies would undoubtedly serve to deter any future misconduct on his part. Cf. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 270 (noting that punitive damages against individual officials of municipalities, as opposed to municipalities themselves, would effectively deter future misconduct).

¹⁶ The jury did not indicate what portion of its award represented compensatory, as opposed to punitive, damages. This underscores the need for the lower courts in the event of a remand—and trial

The punitive damages award in this case rationally serves neither deterrence nor punishment. It exceeds any objectively-based deterrence measure of punitive damages. And it greatly exceeds any amount that might fairly serve to "punish" Pacific Mutual for Ruffin's misdeeds. It should be held constitutionally excessive.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

ERWIN N. GRISWOLD
(Counsel of Record)

PATRICIA A. DUNN

LAURIE W. FINNERAN

DEENA B. JENAB

JONES, DAY, REAVIS & POGUE

1450 G Street, N.W.

Washington, D.C. 20005

(202) 879-3939

Counsel for the Amici

courts in general—to ensure that the record reflects the precise allocation of damages so that reviewing courts can properly apply the constitutional rule against excessive punitive damages awards.

Of Counsel:

KENNETH H. NAILS

JAMES H. BRADNER, JR.

RICHARD E. GOODMAN

MARY N. BELGRADE

Alliance of American Insurers

1501 Woodfield Road

Suite 400 West

Schaumburg, IL 60173-4980

(708) 330-8602

RICHARD E. BARNSBACK

PHILLIP E. STANO

American Council of Life Insurance

1001 Pennsylvania Avenue, N.W.

Washington, D.C. 20004-2599

(202) 624-2183

MICHAEL LOVENDUSKY

American Insurance Association

1130 Connecticut Avenue, N.W.

Suite 1000

Washington, D.C. 20036

(202) 828-7173

JOE W. PEEL

THERESA L. SOROTA

Health Insurance Association

of America

1025 Connecticut Avenue, N.W.

Suite 1200

Washington, D.C. 20036

(202) 223-7822

PATRICK J. McNALLY

JOHN J. NANGLE

National Association of

Independent Insurers

2600 River Road

4th Floor

Des Plaines, IL 60018

(708) 297-7800

June 1990

American College of Trial Lawyers



REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE

Approved by the Board of Regents
March 3, 1989

Copyright 1989
American College of Trial Lawyers
All Rights Reserved

American College of Trial Lawyers

CHANCELLOR-FOUNDER

HON. EMIL GUMPERT
(1895-1982)

OFFICERS

PHILIP W. TONE, *President*
RALPH I. LANCASTER, JR. *President-Elect*
WILLIAM T. EGAN, *Secretary*
CHARLES E. HANGER, *Treasurer*
MORRIS HARRELL, *Immediate Past President*

BOARD OF REGENTS

SAMUEL ADAMS
Boston, Massachusetts

JOHN A. BECK
Washington, D.C.

F. LEE CAMPBELL
Seattle, Washington

GEORGE J. COTSIRILOS
Chicago, Illinois

WILLIAM T. EGAN
Minneapolis, Minnesota

ROBERT B. FISKE, JR.
New York, New York

HUBERT W. GREEN
San Antonio, Texas

FULTON HAIGHT
Santa Monica, California

CHARLES E. HANGER
San Francisco, California

MORRIS HARRELL
Dallas, Texas

FRANK C. JONES
Atlanta, Georgia

RALPH I. LANCASTER, JR.
Portland, Maine

HENRY G. MILLER
White Plains, New York

PAUL D. RENNER
Denver, Colorado

PATRICK T. RYAN
Philadelphia, Pennsylvania

ROBERT G. STACHLER
Cincinnati, Ohio

RALPH M. STOCKTON, JR.
Winston-Salem, North Carolina

PHILIP W. TONE
Chicago, Illinois

American College of Trial Lawyers

PAST PRESIDENTS

1950-51	EMIL GUMPERT* Los Angeles, California	1969-70	HON. LEWIS F. POWELL, JR. Washington, D.C.
1951-52	C. RAY ROBINSON* Merced, California	1970-71	BARNABAS F. SEARS* Chicago, Illinois
1952-53	CODY FOWLER* Tampa, Florida	1971-72	HICKS EPTON* Wewoka, Oklahoma
1953-54	E. D. BRONSON* San Francisco, California	1972-73	WILLIAM H. MORRISON* Portland, Oregon
1954-55	CODY FOWLER* Tampa, Florida	1973-74	ROBERT L. CLARE, JR. New York, New York
1955-56	WAYNE E. STICHTER* Toledo, Ohio	1974-	AUSTIN W. LEWIS* New Orleans, Louisiana
1956-57	JESSE E. NICHOLS* Oakland, California	1975-76	THOMAS E. DEACY, JR. Kansas City, Missouri
1957-58	LEWIS C. RYAN* Syracuse, New York	1976-77	SIMON H. RIFKIND New York, New York
1958-59	ALBERT E. JENNER, JR.* Chicago, Illinois	1977-78	KRAFT W. EIDMAN* Houston, Texas
1959-60	SAMUEL P. SEARS* Boston, Massachusetts	1978-79	MARCUS MATTSON Los Angeles, California
1960-61	LON HOCKER Woods Hole, Massachusetts	1979-80	JAMES E. S. BAKER Chicago, Illinois
1961-62	LEON JAWORSKI* Houston, Texas	1980-81	JOHN C. ELAM Columbus, Ohio
1962-63	GRANT B. COOPER Studio City, California	1981-82	ALSTON JENNINGS Little Rock, Arkansas
1963-64	WHITNEY NORTH SEYMOUR* New York, New York	1982-83	LEON SILVERMAN New York, New York
1964-65	BERNARD G. SEGAL Philadelphia, Pennsylvania	1983-84	GAEL MAHONY Boston, Massachusetts
1965-66	EDWARD L. WRIGHT* Little Rock, Arkansas	1984-85	GENE W. LAFITTE New Orleans, Louisiana
1966-67	FRANK G. RAICHLE* Buffalo, New York	1985-86	GRIFFIN B. BELL Atlanta, Georgia
1967-68	JOSEPH A. BALL Long Beach, California	1986-87	R. HARVEY CHAPPELL, JR. Richmond, Virginia
1968-69	ROBERT W. MESERVE Boston, Massachusetts	1987-88	MORRIS HARRELL Dallas, Texas

* Deceased

COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE

CHAIRMAN

CHARLES B. RENFREW
San Francisco, California

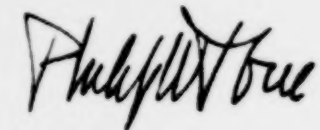
MEMBERS

GRIFFIN B. BELL Atlanta, Georgia	ROBERT M. LANDIS Philadelphia, Pennsylvania
DAVID BERGER Philadelphia, Pennsylvania	ARTHUR L. LIMAN New York, New York
JUDAH BEST Washington, D.C.	ROBERT W. MESERVE Boston, Massachusetts
RICHARD R. BOSTWICK Casper, Wyoming	M. ROLAND NACHMAN, JR. Montgomery, Alabama
JOHN J. BOUMA Phoenix, Arizona	SIMON H. RIFKIND New York, New York
BENJAMIN R. CIVILETTI Washington, D.C.	ASA ROUNTREE New York, New York
THOMAS E. DEACY, JR. Kansas City, Missouri	BERNARD G. SEGAL Philadelphia, Pennsylvania
WAYNE FISHER Houston, Texas	JOHN C. SHEPHERD St. Louis, Missouri
ERWIN N. GRISWOLD Washington, D.C.	LEON SILVERMAN New York, New York
JOHN M. HARRINGTON, JR. Boston, Massachusetts	THOMAS C. UNIS Dallas, Texas
SETH M. HUFSTEDLER Los Angeles, California	HENRY G. MILLER White Plains, New York Regent Liaison
GENE W. LAFITTE New Orleans, Louisiana	

PROFESSOR ROGER C. HENDERSON, Reporter
University of Arizona
College of Law
Tucson, Arizona

FOREWORD

The Board of Regents of the American College of Trial Lawyers, at its meeting in Boca Raton, Florida, February 27 to March 3, 1989, approved the following Report of the Committee on Special Problems in the Administration of Justice, dated March 3, 1989, and directed that copies be distributed to Fellows of the College and to other interested parties.

A handwritten signature in black ink, appearing to read "Philip W. Tone". The signature is written in a cursive, flowing style with some capitalization.

Philip W. Tone
President

TABLE OF CONTENTS

	Page
I. BACKGROUND	1
II. THE NEED FOR THE COLLEGE REVIEW	3
III. CONCLUSIONS AND RECOMMENDATIONS	8
A. Civil Awards of Punitive Damages Should Be Retained, but Only in Carefully Limited Situations	8
B. Punitive Awards Should Not Be a Surrogate for Compensatory Damages	10
C. The Standard for Culpability Should Require a Conscious and Egregious Invasion of the Rights of Others	10
D. The Quantum of Punitive Damages Should Be Limited by a Flexible Formula Based on the Amount of Compensatory Damages	13
E. The Burden of Proof for Punitive Awards Should Be That of Clear and Convincing Evidence	15
F. Vicarious Responsibility for Punitive Damages Should Only Obtain Where There Is Complicity by the Principal in the Conduct Which Gives Rise to the Punitive Award	16
G. Pleadings Regarding Punitive Damage Claims Should Not Be Permitted To Contain a Monetary Amount	16
H. Discovery of Evidence Regarding a Defendant's Wealth or Financial Condition for the Purpose of Proving the Amount of a Punitive Award Should Not Be Permitted Without a <i>Prima Facie</i> Showing That There Is a Legal Basis for Such an Award	17
I. Bifurcated Trials Should Be Employed To Avoid Prejudice to Defendants Where Evidence of Wealth or Financial Condition Is Admissible Only on Claims for Punitive Damages	18
J. Distribution of Punitive Awards Should Not Be Diverted to Persons or Entities Other Than the Plaintiff	19
IV. THE PROBLEM OF DUPLICATIVE PUNITIVE AWARDS FOR THE SAME ACT OR COURSE OF CONDUCT	20
A. State Solutions	21
B. Federal Solutions	22
1. The A.B.A. National Class Action Proposal	22
2. Multidistrict Litigation	23
3. Interpleader	24
4. Comparing the Federal Solutions	25
C. The Preferred Approach	25
V. CONCLUSION	27
APPENDIX: MODEL JURY INSTRUCTIONS ON PUNITIVE DAMAGES	28

**AMERICAN COLLEGE OF TRIAL LAWYERS
REPORT OF
COMMITTEE ON SPECIAL PROBLEMS
IN THE ADMINISTRATION OF JUSTICE**

I. BACKGROUND

On August 8, 1986 the Board of Regents of the American College of Trial Lawyers approved the Report of the Task Force on Litigation Issues, dated July 22 of the same year. The Task Force Report addressed a number of issues regarding the tort litigation system in America and unanimously concluded that one of the greatest problems with the current tort system is the way punitive damages are handled.¹ Although a few members of the Task Force were prepared to abolish punitive damages, other members, who favored continuation of punitive damages awards, indicated that they might move toward abolition if meaningful reform were not forthcoming.²

Subsequent to the American College Task Force Report, the results of two other studies undertaken through the American Bar Association were published. In February of 1987 the American Bar Association House of Delegates approved a report by the Action Commission to Improve the Tort Liability System, chaired by Robert B. McKay, Professor and former Dean of the New York University School of Law. Among other things, the ABA Action Commission recognized that the current situation with regard to awards of punitive damages in the civil justice system presented some serious concerns³ and made a number of general recommendations for reform.⁴ In the meantime, the American Bar Association Section of Litigation had undertaken a study of the problems through a Special Committee on Punitive Damages. Recognizing the relative dearth of statistical data on the subject, the Special Committee commissioned an empirical study by the Institute for Civil Justice, a section of the Rand

1. American College of Trial Lawyers, *Report of the Task Force on Litigation Issues* 4 (1986) (hereinafter referred to as ACTL Task Force Report).

2. *Id.*

3. A.B.A., *Report of the American Bar Association Action Commission to Improve the Tort Liability System* 15-18 (1987).

4. *Id.* at 18-20. The Report supported the continued award of punitive damages in appropriate cases, but recommended that the scope be narrowed in five ways:

- i. The standard of proof for the award of punitive damages should be tightened to limit such awards to cases warranting special sanctions and should not be commonplace.
- ii. Various suggestions to the courts are advanced as a means of judicial limitation of inappropriate or excessive awards.
- iii. Appropriate safeguards should be put in force to prevent any defendant from being subjected to punitive damages that are excessive in the aggregate for the same wrongful act.
- iv. Legislatures and courts should be sensitive to adopting appropriate safeguards to protect the master or principal from vicarious liability for unauthorized acts of non-managerial servants or agents.
- v. In carefully selected cases, courts should be authorized to award some portion of a punitive damages award to public purposes, always being mindful that the plaintiff and counsel are reasonably compensated for bringing the action and prosecuting the punitive damages claim.

McKay, *Rethinking The Tort Liability System: A Report From The ABA Action Commission*, 32 Villanova L. Rev. 1219, 1230-31 (1987).

Corporation in Santa Monica, California.⁵ The Rand report, published in 1987,⁶ served as a basis for the ABA Section of Litigation study. Although the latter also concluded that there were a number of problems with civil awards of punitive damages,⁷ the Section of Litigation did not conclude that the problems, with one exception,⁸ were sufficiently acute as to require legislative solutions. However, a careful analysis of the Rand study shows support for the opposite conclusion.⁹

Because of strong interest in the subject of punitive damages, the Board of Regents of the American College of Trial Lawyers gave approval for the Committee on Special

5. Rand is a private, nonprofit institution, incorporated in 1948, which engages in nonpartisan research and analysis on problems of national security and public welfare. The Institute for Civil Justice, established within the Rand Corporation in 1979, performs independent, objective policy analysis and research on the American civil justice system. The Institute's principal purpose is to help make the civil justice system more efficient and more equitable by supplying policymakers with the results of empirically based, analytic research.

6. M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings*, Rand, The Institute for Civil Justice (1987).

7. *Punitive Damages: A Constructive Examination*, 1986 A.B.A. Sec. Litigation, Special Comm. on Punitive Damages 87-89 (hereinafter cited as A.B.A. Sec. Litigation Report).

8. The Litigation Section Special Committee found that a genuine problem exists regarding the potential for multiple punitive damages awards to be made against a defendant for essentially the same conduct. The Committee concluded that federal legislation would be required to solve the problem, *id.* at 72, and recommended that Congress enact a law creating a national class action which would allow the consolidation of all similar claims in one federal district court. *Id.* at 78-81.

9. The Rand study demonstrates that some major changes have occurred in punitive damage awards in specific areas of litigation in the 25 year period from 1960 through 1984 in the jurisdictions studied — San Francisco, California and Cook County, Illinois. The most dramatic increases occurred in the area of business and contract cases which have come to be subject to the tort of "bad faith." However, products liability and medical malpractice also showed increases in the number and rate of punitive awards. As a general proposition, the frequency of awards has increased relative to the number of cases filed and to the number of cases in which compensatory awards are made, as well as in absolute terms. When this is coupled with the rather dramatic increases in the median and average amounts awarded in all types of cases, one could easily conclude that punitive awards are playing a larger role in the civil justice system than in the past. However, if one merely focuses on the statistics in the aggregate for all types of torts one could conclude there has not been any significant change.

It is submitted that to view the figures in the aggregate is erroneous because certain types of tortious conduct inherently do not give rise to punitive awards. To include figures for this conduct, such as automobile negligence cases, with the more egregious forms of conduct tends to "water down" the results. The same is true if one includes figures regarding traditional intentional torts because there is little change over time in the frequency of punitive awards in these cases. Thus, the Committee on Special Problems believes that the Rand study shows that the problems regarding punitive awards in the civil justice system are more acute for specific areas of tort litigation than indicated in the A.B.A. Sec. Litigation Report.

The Rand Corporation has recently published a follow-up report pointing out that some commentators are misinterpreting an earlier study regarding trends in tort litigation by using aggregate figures on the assumption there is a single tort system. The follow-up report shows that there are different types of tort litigation and that each must be viewed separately in order to accurately determine any changes and trends. The use of aggregate figures tends to mask the real situation. See D. Hensler, M. Variana, J. Kakalik, & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics*, Rand, The Institute for Civil Justice (1987). The same may be said for the subject of punitive damages and any analysis of the Rand study on that subject should take this point into account.

Problems in the Administration of Justice to conduct an independent review of punitive awards in the civil justice system in the United States, including a review of the prior studies and other information on the subject.

To assist the Committee in this effort, the services of Professor Roger C. Henderson of the College of Law at the University of Arizona in Tucson were engaged. Professor Henderson is a former dean of the law school and presently is a Commissioner on Uniform State Laws. He prepared a background paper which was reviewed and discussed by the Committee on Special Problems on March 6, 1988 during the Spring Meeting of the American College in Palm Desert, California.¹⁰ During the Spring Meeting the Committee assisted in presenting one of the main programs, which consisted of a panel on the question of whether punitive damages in the modern civil justice system constituted an anomaly which was in need of change. Subsequently, an issue paper¹¹ prepared by Professor Henderson was distributed to the Committee members and discussed at a special meeting on June 10, 1988. Thereafter a draft report dealing with punitive damages was the subject of a meeting of the Committee on August 6, 1988 at the Annual Meeting of the College during the American Bar Association meeting in Toronto, Canada. The Committee met again on November 11, 1988 and January 9, 1989 in New York City to discuss subsequent drafts of the report.

After deliberation and study, the Committee on Special Problems has come to certain conclusions with regard to punitive awards in the modern civil justice system and has fashioned recommendations for improvements. Initially, however, a brief review of why this study was warranted is appropriate in view of the prior efforts on the subject.

II. THE NEED FOR THE COLLEGE REVIEW

In the 1986 Report of the Task Force on Litigation Issues, serious concern was expressed regarding the role of punitive awards in the civil justice system. It was noted that awards often bear no relation to deterrence and merely reflect a jury's dissatisfaction with a defendant and a desire to punish, often without regard to the true harm threatened by a defendant's conduct.¹² The Report also noted that there was a general feeling that punitive awards should be more difficult to obtain and that the amounts of such awards should be subject to more control than was being exercised at that time.¹³ The Report went on to recommend that there be some limit, either by a cap or some general formula, to the amount of punitive damages that may be recovered.¹⁴ In addition, it was recommended that some means should be found to prevent a defendant from being subjected to duplicative punitive awards for a single act or course of conduct.¹⁵ Finally, there were recommendations that serious consideration should be

10. This paper, entitled "Punitive Damages in the Modern Civil Justice System: An Anomaly in Need of Change?", is on file at the National Headquarters, American College of Trial Lawyers, 10866 Wilshire Blvd., Los Angeles, California 90024.

11. This paper also is on file at the National Headquarters. See *supra* n. 10.

12. ACTL Task Force Report *supra* n. 1, at 4.

13. *Id.*

14. *Id.*

15. *Id.*

given to raising the standard of proof, to developing better jury instructions and to greater judicial supervision concerning punitive damage awards.¹⁶ In sum, the Task Force Report expressed certain expectations concerning improvements that should be made in the system. Moreover, as noted, some members indicated that they might be willing to support the abolition of punitive awards in the civil system if these improvements were not made.¹⁷

Following the Report of the Task Force and its approval by the College Board of Regents, the A.B.A. Action Commission to Improve the Tort Liability System and Section of Litigation reported similar concerns and made recommendations for changes in the system.¹⁸ In addition to these reports, there has been a plethora of articles and comments in legal periodicals concerning the situation generally, the overwhelming majority of which call for some change in the process by which punitive damages are awarded.¹⁹

16. *Id.*

17. *Id.* As previously noted, a few members of the Task Force were in favor of abolition as the exclusive reform effort. See text at n. 2.

18. See *supra* text at nn. 3-4 and 7-8.

19. For articles arguing for:

(1) *abolition*, see Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 *Forum* 57 (1975); Dubois, *Punitive Damages: Bonanza or Disaster*, 3 *Litigation* 35 (Fall 1976); Ghiardi, *The Case Against Punitive Damages*, 8 *Forum* 411 (1972); Ghiardi, *Should Punitive Damages Be Abolished? — A Statement for the Affirmative*, 1965 *A.B.A. Sec. Ins., Negl. & Comp. L. Proc.* 282; Long, *Punitive Damages: An Unsettled Doctrine*, 25 *Drake L. Rev.* 870 (1976); and Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 *Vanderbilt L. Rev.* 1117 (1984);

(2) *modification*, see Barrett & Merriman, *Legislative Remedies for Punitive Damages*, 28 *Federation of Ins. Counsel Q.* 339 (1978); Bell & Pearce, *Punitive Damages and the Tort System*, 22 *U. Richmond L. Rev.* 1 (1987); Cooter, *Economic Analysis of Punitive Damages*, 56 *S. Cal. L. Rev.* 79 (1982); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 *S. Calif. L. Rev.* 1 (1982); Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 *Columbia L. Rev.* 1385 (1987); Launie, *The Incidence and Burden of Punitive Damages*, 53 *Ins. Counsel J.* 46 (Jan. 1986); Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, 1980 *Ins. L.J.* 257; Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 *Hastings L.J.* 639 (1980); Martin, *The Relation of Exemplary Damages to Compensatory Damages*, 22 *Texas L. Rev.* 235 (1944); McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 *North Carolina L. Rev.* 129 (1930); Morris, *Punitive Damages in Tort Cases*, 44 *Harvard L. Rev.* 1173 (1931); Owen, *Civil Punishment and the Public Good*, 56 *S. Cal. L. Rev.* 103 (1982); Phillips, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment*, 1984 *U. Illinois L.F.* 153 (1984); Priest, *Punitive Damages and Enterprise Liability*, 56 *S. Cal. L. Rev.* 123 (1982); Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 *Drake L. Rev.* 195 (1977-78); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedure*, 69 *Va. L. Rev.* 269 (1983); and Woodbury, *Limiting Discovery of a Defendant's Wealth When Punitive Damages Are Alleged*, 23 *Duquesne L. Rev.* 349 (1985) and 34 *Defense L.J.* 675 (1985);

(3) *the status quo*, see Bedell, *Punitive Damages in Arbitration*, 21 *J. Marshall L. Rev.* 21 (1987); Bell, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 *UMKC L. Rev.* 1 (1980); Corboy, *Are Punitive Damages Getting Out of Control? The Existing Controls Are Effective*, 70 *A.B.A. J.* 16 (Dec. 1984); Courtney & Cavico, *Punitive Damages: When Are They Justifiable?*, 18 *Trial* 52 (Aug. 1982); Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest*, 18 *St. Mary's L.J.* 797 (1987); and Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 *S. Cal. L. Rev.* 133 (1982).

As a result of the widespread concern regarding the problems associated with punitive damages, there has been a spate of state court²⁰ and legislative²¹ activity across the nation on this subject. Unfortunately, no clear pattern has emerged in the main, although there has been a trend in some areas which may eventually result in more uniformity among the states. For example, of those states that have addressed problems regarding punitive damages, most now require that the plaintiff meet the burden of proving by clear and convincing evidence that punitive damages should be awarded.²²

20. See, e.g., *Rawlings v. Apodaca*, 151 *Ariz.* 149, 726 P.2d 565 (1986) (addressing standard for culpability); *Linthicum v. Nationwide Life Ins. Co.*, 150 *Ariz.* 326, 723 P.2d 675 (1986) (addressing burden of proof); *Grimshaw v. Ford Motor Co.*, 119 *Cal. App. 3d* 757, 174 *Ca. Rptr.* 348 (1981) (addressing, *inter alia*, various constitutional issues); *Tuttle v. Raymond*, 494 *A.2d* 1353 (Maine 1985) (addressing burden of proof); and *Anderson v. Continental Insurance Co.*, 85 *Wis. 2d* 675, 271 *N.W.2d* 368 (1978) (addressing standard for culpability).

21. For example, with regard to attempts to limit the amount of punitive awards Alabama has adopted a cap of \$250,000 except where there is a practice or pattern of intentional wrongful conduct, actual malice, or defamation. *Ala. Code* § 6-11-21 (Supp. 1988). Colorado limits the punitive award to an amount equal to actual damages except the court has the power to make an addition up to three times the actual damages in enumerated cases of aggravated conduct. *Colo. Rev. Stat.* § 13-21-102 (1987). Florida creates a presumption which limits the amount of punitive awards to three times that of the actual damages unless the claimant demonstrates by clear and convincing evidence that any award which is greater than this amount is not excessive. *Fla. Stat.* § 768.73 (Supp. 1988). Georgia limits such awards to \$250,000 except in product liability cases or where the defendant specifically intended to cause harm. *Ga. Code Ann.* § 105-2002.1 (Supp. 1988). Kansas limits the amount of punitive damages in medical malpractice cases to the lesser of 25% of the defendant's highest gross annual income during the five year period prior to the wrongful act or \$3 million. *Kan. Stat. Ann.* § 60-3402 (Supp. 1987). (This particular provision of

the Kansas medical malpractice legislation has not been challenged as of yet on constitutional grounds, but other provisions have been held unconstitutional by the Supreme Court of Kansas. See *Kansas Malpractice Victims Coalition v. Bell*, _____ *Kan.* _____, 757 P.2d 251 (1988) and *Farley v. Engelken*, 241 *Kan.* 663, 740 P.2d 1058 (1987). There is a serious question as to the constitutionality of this particular provision under Kansas law because it limits the right to a jury trial on punitive damages. See *Folks v. Kansas Power and Light Co.*, _____ *Kan.* _____, 755 P.2d 1319 (1988).) Oklahoma limits punitive awards to an amount equal to the actual damages except where evidence of the wrongful conduct is clear and convincing. *Okla. Stat. Tit. 23, § 9* (1987). Texas limits awards of punitive damages to four times the amount of actual damages or \$200,000, whichever is greater, for cases involving "fraud" or "gross negligence," but the limit does not apply to cases involving "malice" or to intentional torts, the terms in quotes being defined in the statute. *Tex. Civ. Proc. & Rem. Code Ann.* §§ 41.001-.008 (Vernon Supp. 1988).

22. For cases adopting this standard see, e.g., *Linthicum v. Nationwide Life Ins. Co.*, *supra* n. 20; *Travelers Indemnity Co. v. Armstrong*, 442 *N.E.2d* 349 (Ind. 1982); *Tuttle v. Raymond*, 494 *A.2d* 1353 (Maine 1985); *Wangen v. Ford Motor Co.*, 97 *Wis. 2d* 260, 294 *N.W.2d* 437 (1980). For statutory adoptions see, e.g., *Ala. Code* § 6-11-20 (Supp. 1988); *Cal. Civil Code* § 3294 (Supp. 1988); *Minn. Stat. Ann.* § 549.20(1) (1988); *Mont. Code Ann.* § 27-1-221(5) (1987); and *Or. Rev. Stat.* § 30.925 (1983). See also *Colo. Rev. Stat.* § 13-25-127(2) (1987) (adopting proof beyond a reasonable doubt). Compare *Fla. Stat.* § 768.73 (Supp. 1988) (apparently adopting the clear and convincing test only for amounts which exceed the presumptive cap of three times the amount of compensatory damages, but continuing the use of the mere preponderance test for the treble award) and *Okla. Stat. Tit. 23, § 9* (1987) (following the same pattern as Florida).

Also, it appears that the law is evolving in many jurisdictions to require that there be some conscious indifference to the rights of others before punitive damages are warranted.²³ However, it is not easy to divine this latter rule from the myriad of adjectives employed in attempting to define the standard of culpability in any particular jurisdiction.²⁴

Attempts at reforming other punitive damage problem areas have been anything but satisfactory. For example, there still are serious questions concerning: (1) the standard to be applied by the trier of fact in determining the quantum, and the standard to be applied in appellate review of any punitive award; (2) the vicarious exposure facing employers and others; (3) the "windfall" nature of punitive awards and the question of who should receive the award; (4) the potential abuses in the trial process regarding pleading and discovery; and (5) the possible prejudice to defendants on the compensatory liability issue through introduction of otherwise irrelevant evidence of wealth or financial condition at the stage where that liability issue is being resolved. Moreover, there has yet to be a satisfactory solution to the situation that all agree is a very serious problem — duplicative awards for the same act or course of conduct. In fact, as a result of the recent legislative activity, the legal landscape has now been strewn with a number of pieces of disparate legislation in the various states so that in a very real sense the situation could be described as being as confused and uncertain as before the reform efforts began.²⁵ Considerable improvements still could be made to bring about more evenhanded treatment of litigants both within a jurisdiction and between jurisdictions. In short, the situation is very much in need of attention and clearly falls within the charge of the Committee on Special Problems, which has the responsibility of promoting improvements in the administration of

justice and maintaining proper liaison with others to that end.

Finally, two other matters should be mentioned. First, there has been a movement in the criminal justice system to attempt to standardize penalties. The most notable effort in this regard has taken place at the federal level.²⁶ The sense that there should be evenhanded treatment of those who are subject to criminal penalties also provides part of the motivation for reform in the civil system. Secondly, a number of constitutional issues that have lain dormant for years have recently been brought to the attention of the courts. The Supreme Court of the United States has granted review to consider constitutional limits on punitive damages awards on three occasions since 1986. In particular, there appears to be concern on the part of some members of the Court as to whether the Eighth Amendment to the United States Constitution guaranteeing that excessive fines shall not be imposed applies to civil punitive awards.

In 1986 in *Aetna Life Ins. Co. v. Lavoie*,²⁷ the Supreme Court noted that a challenge to punitive damages as excessive under the Eighth and Fourteenth Amendments "raise[d] important issues which, in an appropriate setting, must be resolved."²⁸ Two years later in the case of *Bankers Life and Casualty Co. v. Crenshaw*,²⁹ the Court granted *certiorari* and heard oral argument as to whether the Eighth Amendment applies to civil punitive awards and whether the punitive damage award in the case violated the Due Process and the Contract Clauses of the Constitution. Although the Supreme Court declined to decide these issues in *Aetna* and *Bankers Life*, as this report was being finalized the Court again granted *certiorari*, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,³⁰ on the question of whether an award of \$6 million in punitive damages, amounting to more than 100 times the plaintiff's actual damages, is excessive under the Eighth Amendment or otherwise. These cases illustrate that there are several potential problems at the constitutional level with the current rules in the various states. It is possible that these constitutional problems could be obviated through responsible reform efforts. It is the judgment of the Committee on Special Problems that this adds impetus to the need for prompt action. Thus, it is hoped that this Report, which has been approved by the Board of Regents of the American College of Trial Lawyers, will serve to expedite responsible reform efforts so as to achieve improvements in the justice system in this country.

23. See, e.g., *Rawlings v. Apodaca*, *supra* n. 20; *Freeman v. Anderson*, 279 Ark. 282, 651 S.W.2d 450 (1983); *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987); *Tuttle v. Raymond*, *supra* n. 22; *Preston v. Murty*, 32 Ohio St. 3d 334, 512 N.E.2d 1174 (1987); *Enright v. Lubow*, 202 N.J. Super. 58, 493 A.2d 1288 (App. Div. 1985); Ala. Code § 6-11-20 (Supp. 1988); Cal. Civil Code § 3294 (Supp. 1988); Colo. Rev. Stat. § 13-21-102(1) (1987); Ga. Code Ann. § 1005-2002.1(b) (Supp. 1988); Iowa Code Ann. § 668A.1 (1986); Minn. Stat. Ann. § 549.20(1) (1988); Okla. Stat. Ann. Tit. 23, § 9 (1987); Tex. Civ. Proc. & Rem. Code Ann. §§ 41.001-.003 (Supp. 1988).

24. See the discussion in *Linthicum v. Nationwide Life Ins. Co.*, *supra* n. 20. See also 1 J. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 5.01 (1985).

25. In addition to the different statutory approaches indicated in n. 21, *supra*, regarding attempts to limit the amount of punitive awards, a number of states have taken different approaches to the so-called "windfall" problem. For recent legislation in this area, see, e.g., Colo. Rev. Stat. § 13-21-102(4) (1987) (allocating one-third of a punitive award to the state general fund, two-thirds to the plaintiff); Fla. Stat. § 768.73 (Supp. 1988) (40% to the plaintiff and 60% to the state general fund unless the cause of action was based on personal injury or wrongful death, in which event the state's share is to be paid to Public Medical Assistance Trust Fund); Ga. Code Ann. § 105-2002.1 (Supp. 1988) (three-fourths to the state, one-fourth to the plaintiff); Iowa Code Ann. § 668A.1 (1987) (100% to the plaintiff if the act was directed at the plaintiff; if not, three-fourths of the award goes to a state fund used for indigent civil litigation programs or insurance assistance programs); and Mo. Ann. Stat. § 537.675 (Vernon 1988) (50% of punitive award, after deduction of attorneys' fees and expenses, payable to state of Missouri). Kansas passed medical malpractice legislation which requires that punitive awards in such cases be allocated one-half to the plaintiff and one-half to the state health care maintenance fund (see Kan. Stat. Ann. § 60-3402 (1986)), but the constitutionality of this legislation is questionable. See *supra* n. 21.

26. The Comprehensive Crime Control Act of 1984 created a United States Sentencing Commission to recommend new sentencing guidelines to go into effect in federal courts in 1986. One of the main purposes of the legislation is to establish sentencing policies and practices for the Federal criminal justice system that provide certainty and fairness and which avoid unwarranted sentencing disparities among defendants who are similarly situated. See 28 U.S.C. § 991(b)(1) (Supp. 1987). The Supreme Court of the United States upheld the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission against an attack that Congress had delegated excessive legislative power to the Commission and that the legislation violated the separation-of-powers principle. *Mistretta v. United States*, 109 S. Ct. 647 (1989).

27. 106 S. Ct. 1580.

28. *Id.* at 1589.

29. 108 S. Ct. 1645 (1988).

30. 845 F.2d 404 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 527 (1988).

III. CONCLUSIONS AND RECOMMENDATIONS

A. Civil Awards of Punitive Damages Should Be Retained, But Only in Carefully Limited Situations.

It has been forcefully argued that punitive awards in the modern civil justice system are an anomaly and should be abolished except where specifically authorized by statute.³¹ Originally, such common law awards in large measure served as surrogates for pain and suffering and other noneconomic losses which at the time were yet to be recognized on a *de jure* basis by courts of law.³² It is contended that now that noneconomic losses, such as pain and suffering, are fully recoverable in tort actions in their own right as compensatory damages, there is no basis for permitting punitive awards for any compensatory purpose.³³ Nor should punitive awards serve to reimburse plaintiffs for attorney fees and other litigation expenses in the absence of a specific statute or rule of court providing for such.³⁴ This is based on the simple proposition that the common law rule in the United States is that each party bears the cost of his or her own attorney fees and litigation expenses. The civil system does not provide the requisite constitutional and procedural safeguards for penal awards and was never designed to be a system for punishment beyond the admonition which is inherent in compensatory awards.³⁵ Finally, the argument goes, punishment should be limited to the criminal justice system and otherwise to specific situations expressly set out in legislative enactments, and even there the legislation should provide appropriate safeguards so as to not violate fundamental rights.

A majority of the Committee, while recognizing the force of these arguments, notes that punitive awards have long been a part of the civil justice system and that they have been recognized in addition to potential criminal sanctions. Although the early common law did recognize punitive awards in the civil system as a surrogate for noneconomic losses, they were not recognized for that purpose exclusively. Punitive awards also were recognized as serving the admonitory goal of the civil system in

31. See, e.g., Ghiardi, *supra* n. 19 at 423-24 and Sales & Cole, *supra* n. 19 at 1117.

32. Fay v. Parker, 53 N.H. 342 (1873); Stuart v. Western Union Telegraph Co., 66 Tex. 580, 18 S.W. 351 (1885). See also K. Redden, Punitive Damages 28-29 (1980) and 1 T. Sedgwick, A Treatise on the Measure of Damages 688-89 (9th ed. 1912).

33. Ghiardi, *supra* n. 19 at 423-24 and Sales & Cole, *supra* n. 19 at 1164-65.

34. Ghiardi, *supra* n. 19 at 417.

35. See C. McCormick, Handbook on the Law of Damages 276 (1935). See also 1 J. Ghiardi & J. Kircher, *supra* n. 24, ch. 3 (1985) and K. Redden, *supra* n. 32, ch. 7.

detering and punishing wrongdoers.³⁶ It also is true that punitive awards in the civil justice system serve to reach certain types of conduct that either are not punishable at all under the criminal system or as a practical matter will not be the subject of a criminal proceeding. As a result, the common law ultimately has come to recognize two types of awards — one mainly to compensate for economic and noneconomic losses and one mainly to punish. Although each is designed to deter, the Committee is convinced that the more severe sanction is still needed. Notwithstanding the general conclusion of the Committee that punitive awards are still justifiable in the civil system today, it also concluded that such awards should be available only in carefully limited

36. In *Huckle v. Money* [K.B. 1763] 2 Wils. 205, 95 Eng. Rep. 768, one of the earliest English cases on record upholding an award of exemplary damages, it is clear that the monetary award was meant to punish and deter. *Huckle* was illegally taken into custody and he subsequently brought an action for trespass, assault and imprisonment. Although he was not mistreated physically and the confinement was brief, the jury assessed his damages at 300 pounds which was almost three hundred times any pecuniary loss that he could have suffered. The court upheld the award and in doing so the Lord Chief Justice stated:

[T]he personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20l. damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.

Id. at 206-07, 95 Eng. Rep. at 768-69.

Exemplary or punitive damages are still recognized in England today, albeit on a more circumscribed basis than that in the United States. See *Rookes v. Barnard* [1964] 1 All Eng. Rep. 367 where the House of Lords limited punitive damages to two common law situations: (1) "oppressive, arbitrary or unconstitutional action by servants of the government" and (2) where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff." *Id.* at 410. Exemplary damages expressly authorized by statute also are permitted. *Id.* at 411.

Canadian courts have not followed the restrictions enunciated by the English House of Lords in *Rookes v. Barnard*, but have followed a course that generally resembles that of the courts in the United States. See K. Cooper-Stephenson & I. Saunders, *Personal Injury Damages in Canada*, ch. 13 (1981).

It also is to be noted that both England and Canada distinguish "aggravated damages" from punitive damages, and for that matter, from awards solely to compensate for losses and other harm. Aggravated damages are given to compensate when the harm done to the plaintiff by a wrongful act was aggravated by the manner in which the act was done; punitive damages being reserved to punish and thereby provide moral retribution or deterrence. *Id.* at p. 688.

situations.³⁷ Those situations and the limitations are discussed below.

B. Punitive Awards Should Not Be a Surrogate for Compensatory Damages.

The civil justice system should not recognize punitive awards for the purpose of compensating successful plaintiffs. The common law over time has recognized new rights and measures for compensation and is fully capable of doing so in the future. Economic and noneconomic losses are compensable today, and a clear distinction ought to be maintained between awards of that nature and those which are imposed solely to punish and deter. The maintenance of this distinction is important in administering the rules because there should be differences in the process for obtaining the two types of awards. For example, it has already been noted that a clear-and-convincing standard for the plaintiff's burden of proof has been adopted by a number of jurisdictions regarding punitive damages.³⁸ A mere preponderance is the standard for obtaining compensatory damages. As will be seen below, other distinctions arise from the recommendations of the Committee, and they should not be eroded by permitting one type of damage to serve as a surrogate for the other type. Civil punitive awards should be limited to those egregious situations which clearly call for punishment and deterrence beyond that which is inherent in compensatory awards.

C. The Standard for Culpability Should Require a Conscious and Egregious Invasion of the Rights of Others.

The appropriate minimum standard for culpability for punitive awards, recognized in some recent, more analytical decisions,³⁹ requires a conscious indifference to the rights of others. This test encompasses the traditional intentional torts, such as assault, battery, and false imprisonment, all of which require that the actor know or understand that there is a great degree of certainty that the invasion will take place,⁴⁰ as well as torts based on lesser degrees of cognition, such as where the defendant acts in a wilful or wanton manner, or with a certain type of recklessness.⁴¹ This test, however, would not permit punitive awards where the element of consciousness is sufficiently lacking, such as in the case of negligent, or even grossly negligent, conduct.

The Restatement of Torts, Second, distinguishes various types of conduct on the basis of cognition, i.e., the degree to which the actor appreciates or understands that harm will or may result from his or her conduct.⁴² The greater the knowledge of harm, the greater the culpability. It is the Committee's position that civil punitive awards can only be justified on the basis of the more serious or egregious conduct. Although there is strong support for this position under recent case law,⁴³ there still is precedent

which leaves much to be desired in the way of clarity.⁴⁴

A close examination reveals that much of the confusion arises in the area where mere inadvertent conduct interfaces with the more cognitive forms of conduct. The two types of conduct are most often described as "gross negligence" and "recklessness."⁴⁵ It is the overwhelming majority rule that punitive damages are not available for mere negligence, just as it is the rule that they are available for intentional, wilful, wanton or reckless conduct.⁴⁶ As for "gross negligence," — a perplexing term at best⁴⁷ — some jurisdictions may permit punitive damages for this category of conduct.⁴⁸ It is questionable though whether mere extreme carelessness as distinguished from the type of conscious indifference that is explicit in the term intentional and

44. For example, compare *City of Gladewater v. Pike*, 727 S.W.2d 514 (Tex. 1987) (holding "grossly negligent" conduct sufficient, but such conduct must evidence an outrageous state of mind — one of malicious or "evil" intent) with *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981) (approving a jury instruction defining "heedless and reckless disregard," which the court stated was synonymous with "gross negligence," to mean "an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the person affected by it").

45. The term "reckless" is usually expressed as part of the phrase "wilful, wanton and reckless," and all three terms are considered to mean the same thing. W. Prosser & W.P. Keeton, *supra* n. 41 at 212.

46. See 1 J. Ghiardi & J. Kircher, *supra* n. 24.

47. "As it [gross negligence] originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous, and struggling to assign some more or less definite point of reference to it, have construed gross negligence as requiring wilful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof — sometimes on the ground that this must necessarily have been the intent of the legislature. But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind. There is, in short, no generally accepted meaning; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences." W. Prosser & W.P. Keeton, *supra* n. 41 at 211-212.

48. *Id.* at 10.

37. Bell & Pearce, *supra* n. 19 at 17.

38. See *supra* n. 22.

39. See, e.g., *Rawlings v. Apodaca* *supra* n. 20.

40. "The word 'intent' is used throughout the Restatement of this subject [intentional torts] to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement (Second) of Torts § 8A (1965).

41. W. Prosser & W.P. Keeton, *Law of Torts* 10 and 212 (1984).

42. See Comment to § 8A, Restatement (Second) of Torts (1965).

43. See, e.g., *Rawlings v. Apodaca* and *Anderson v. Continental Insurance Co.*, *supra* n. 20.

implicit in the terms wilful, wanton and reckless should suffice.⁴⁹

The Committee believes that punishment over and above that involved in a compensatory award is not warranted for conduct that does not involve a conscious invasion. It is the very element of consciousness or awareness that renders the conduct so morally reprehensible as to call for different treatment. Conduct, extreme as it may be, that lacks cognition of harm more closely resembles inadvertent or negligent conduct than it does the type of conduct which calls for a greater sanction than that inherent in a compensatory damage award. Moreover, permitting punitive awards based merely on different degrees of carelessness or inadvertent conduct exacerbates the already difficult problem of articulating a clear standard to be employed by the trier of fact and for review on appeal. Thus, the logical and practical line of demarcation should be drawn at the point where the defendant realizes that his or her conduct will, or that there is a very strong probability that it may, cause the resulting harm. Conduct, such as extreme carelessness, which does not involve this basic element of consciousness should not be the subject of punitive damages. The admonitory function of compensatory damages should suffice to deter these less egregious forms of conduct just as it is supposed to deter negligent conduct.⁵⁰

Bare satisfaction of the conscious indifference standard, however, does not mean that punitive damages automatically follow. Whether the conduct in question is so aggravated as to justify such an award still should be a matter to be determined by the

49. The comments in the Restatement of Torts, Second, draw a distinction between these forms of conduct based on the knowledge of the actor:

While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. . . . Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

§ 500, Comments f and g (1965).

50. See *Morris*, *supra* n. 19 at 1177.

The position of the Committee is not entirely consistent with the definition of "recklessness" as found in Restatement (Second) of Torts § 500 (1965). The position of the Committee requires that the actor realize, i.e., know or understand, that there is a strong probability that harm may result. It does not encompass the situation, as does the Restatement, where the actor, from facts which he or she knows, should realize that there is a strong probability that harm may result. See *supra* n. 49. The latter standard sounds more in negligence and would permit, in the opinion of the Committee, cases to go to the jury without proof of the type of state of mind which may warrant a punitive award.

trier of fact.⁵¹ In addition to requiring knowledge, the instruction to the jury should state that punitive awards are to be made only in those cases in which it is established, that the tortfeasor acted in a particularly egregious manner.⁵² This element of aggravated conduct is often referred to as the requirement of a bad motive or evil mind,⁵³ and in some instances is best described by the term "outrageous." Case law is replete with attempts by courts to delineate these more antisocial acts. Such words as "malicious," "evil," "vindictive," "oppressive," "fraudulent," "outrageous" and the like have been employed⁵⁴ and should still be employed in jury instructions to require such findings before punitive damages are assessed.⁵⁵ Thus, it is recommended that judicial decisions and any legislation on the subject make it clear that punitive awards in the civil justice system may be justified only in cases involving the most egregious forms of conduct. If there is evidence of bad motive, recidivism, or other aggravating conduct, the trier of fact should take this into account in deciding whether to assess punitive damages at all and, if so, the amount.⁵⁶

The Committee also observes that the articulation of a clear minimum standard for culpability should enable a trial judge to withdraw the issue of punitive damages from the jury in those cases in which there is a failure to introduce clear and convincing evidence upon which a jury could find that the defendant's conduct was of the character required for the imposition of punitive damages. In any event, no punitive award should be permitted for conduct that fails to meet the minimum standard.

D. The Quantum of Punitive Damages Should Be Limited by a Flexible Formula Based on the Amount of Compensatory Damages.

The Committee is concerned that the current state of the law provides little guidance to the trier of fact regarding the standard for assessing the amount of punitive damages. The case law, again, is replete with references to the egregious nature of the conduct, the wealth or power of the defendant, the relation of the punitive award to the compensatory award, and the like.⁵⁷ This all leaves one with a sense of frustration in trying to ascertain whether the punitive award is excessive, particularly on review by the appellate courts.⁵⁸ In fact, there is evidence that the current attempts to articulate a standard lead to excessive awards because these definitions fail to provide sufficient

51. See Restatement (Second) of Torts § 908, Comment d (1979); D. Dobbs, *Handbook on the Law of Remedies* 204 (1973).

52. Restatement (Second) of Torts § 908, Comment d (1979).

53. See *Rawlings v. Apodaca*, *supra* n. 20 at 162, 726 P.2d at 578.

54. D. Dobbs, *supra* n. 51 at 205.

55. See Restatement (Second) of Torts § 908, Comment b (1979).

56. *Id.*

57. See *K. Redden*, *supra* n. 32, at § 3.5. See also Restatement (Second) of Torts § 908, Comment e (1979).

58. The appellate courts have resorted to such tests as whether the award is so excessive that it must necessarily be a product of passion, prejudice, or corruption of the jury and whether the punitive award bears a reasonable relationship to the compensatory award. *K. Redden*, *supra* n. 32 at § 3.6. Whatever the test, it is clear that the tests are more often a rationalization of results than a means of obtaining them. *Morris*, *supra* n. 19 at 1180.

guidance to juries.⁵⁹ The opportunity for bias and prejudice to operate is too great. It would be unthinkable to use such vague standards to assess punishment in the criminal system, much less to let a jury do it. Consequently, the Committee has concluded that some more definite structure needs to be employed regarding the standard for assessing the amount of damages.

First, the Committee recommends that greater attention be paid to the question of whether the evidence offered is so highly prejudicial as to outweigh its probative value under Federal Rule of Evidence 403 or the equivalent state rule. This concern, which frequently arises in criminal cases, seems to be overlooked in the civil process. Since the civil punitive award serves the same purpose as the criminal sanction, the same considerations should apply. Courts should not permit the "waving of bloody shirts" in civil trials any more than in criminal.

Second, courts should pay particular attention to the jury instructions in defining the burden of proof and standard for culpability. In this vein, the courts should attempt to formulate more precise instructions regarding the methods by which juries assess punitive awards, taking care to inform the jury that it is within their discretion as to whether any punitive award is to be assessed, that the award should not be excessive and that they have to be clearly convinced that the amount is appropriate under the circumstances. A model jury instruction covering these points as well as others is contained in an appendix to this report.

The above recommendations are designed to meet the point of the American College Task Force Report that greater judicial supervision of punitive awards is needed. Although the Committee has concluded that the above suggestions will serve in that way and recommends that they be adopted, it does not feel that these changes will completely solve the problem of excessive awards, because the standards for assessing the quantum are inherently deficient insofar as providing any meaningful guidance to juries and for appellate review. Various techniques were considered in an attempt to regulate jury awards in a fair and reasonable manner. Some members of the Committee favored using a "cap" or maximum limit, while others were opposed to any such method. Even among those favoring a cap, different approaches were advocated. The merits of an absolute dollar cap were advanced, as were those of a

59. The Rand study on punitive damages, mentioned earlier, also attempted to determine what post-trial adjustments might have occurred to punitive awards and developed sufficient data to provide statistically useful information involving 33 percent of the cases in the study. It was learned that punitive awards were frequently reduced by post-trial actions, such as settlements, remittitur, and appellate decisions. The data showed that jury verdicts were reduced in approximately one-half of the trials reported on and that the larger the award the greater the chance of significant reduction. M. Peterson, S. Sarma & M. Shanley, *supra* n. 6 at 26-30.

Both the Rand study, *id.* at xi., and the A.B.A. Litigation Section Report, *supra* n. 7 at 21-22, took a somewhat optimistic view that — even though punitive awards have increased in both absolute and relative terms over the past 25 years — because of post-trial actions, the situation probably is not as dire as some might believe. However, one is equally entitled to take a more negative view — based on the same evidence — that juries exceeded or abused their discretion in many cases and that these predominated in the large awards. One could also observe that the Rand and A.B.A. positions may underestimate the overall impact of the large awards on the civil justice system, just as the latter position may overstate it. The prospect of having a jury go overboard, however, cannot be salutary even if there is the possibility of a later reduction.

formula based on compensatory damages. In the end, however, a substantial majority were in favor of the following approach.

The Committee recommends that the various legislative bodies enact a statute which limits the recovery of any punitive award by a plaintiff in a tort case to twice the amount of the compensatory award or \$250,000, whichever is greater. This approach provides for flexibility. The plaintiff that suffers amounts of compensatory harm below \$125,000 as the result of outrageous conduct by the defendant would be permitted to recover a substantial punitive award, but the limit of \$250,000 would prevent an excessive award. On the other hand, where the compensatory harm exceeds \$125,000 the ceiling on any punitive award would rise commensurately with the compensatory harm. There would be no limit in the serious injury cases except for the trebling effect provided by the formula. The Committee believes that this approach is fair to all concerned in that the award would punish and deter and yet not unjustly subject defendants to ruinous liability.

Finally, as a corollary to the proposal regarding the monetary limitation on punitive awards, the Committee recommends that the jury not be informed of the limitations. One reason for this recommendation is obvious — the jury should not be permitted to circumvent the rules by arbitrarily increasing the amount of compensatory damages. A less obvious, but a real concern nevertheless, is that the maximum amount of \$250,000 in small compensatory injury cases should not become the rule. The jury should assess the punitive award on the basis of the evidence and the law as contained in the instructions from the court. The monetary limitations, which provide a range similar to that in the criminal system, should be applied by the court where necessary after the verdict has been rendered.

E. The Burden of Proof for Punitive Awards Should Be That of Clear and Convincing Evidence.

The Committee on Special Problems notes that since the Task Force Report, which recommended that the burden of proof for punitive damages should be raised, those jurisdictions which have considered the issue have reaffirmed or moved to a clear-and-convincing standard.⁶⁰ One jurisdiction has even adopted the criminal burden, by requiring proof beyond a reasonable doubt.⁶¹

Although some members of the Committee favored the retention of the mere-preponderance standard and others felt that the criminal standard of beyond a reasonable doubt should be employed, a majority of the Committee recommends that all jurisdictions follow the modern trend and adopt the clear-and-convincing standard. The clear-and-convincing standard, when coupled with the recommendations regarding the standards for determining liability and the rules regarding the quantum of damages, is more in harmony with a system for punishment than the mere-preponderance standard applicable in civil proceedings regarding compensatory damages and similar remedies which merely attempt to restore the *status quo*. While the beyond-a-reasonable-doubt standard is appropriate where life and liberty is literally at stake, the Committee does not feel that the criminal standard is appropriate

60 See *supra* n. 22.

61 Colo. Rev. Stat. § 13-25-127(2) (1987).

where a civil penalty is sought. The intermediate standard, requiring clear and convincing evidence, is the most appropriate, in the opinion of the Committee.

F. Vicarious Responsibility for Punitive Damages Should Only Obtain Where There Is Complicity by the Principal in the Conduct Which Gives Rise to the Punitive Award.

The Committee on Special Problems does not believe that there is any justification for holding a party responsible for an act which gives rise to punitive damages if that person or entity, through its officers or managerial employees or agents, did not commit or otherwise significantly participate in, or in some manner actually control or ratify, the act. The purpose of punitive damages is to punish and deter certain wrongful conduct. If the individual or entity did not engage in that conduct, there is no rational purpose in punishing or attempting to deter the person or entity. This is the position of the American Law Institute as found in the Restatements of Agency and Torts.⁶² A number of courts follow the Restatement rule, but there are cases that adopt the so-called "liberal" rule, which imposes punitive damages in some situations merely on the basis of *respondeat superior*.⁶³ Under this rule, the principal is liable because of the mere relationship instead of any wrongdoing. Although this may be appropriate for compensatory damages, the Committee fails to see the justification for such a rule where punitive damages are claimed and recommends that the position adopted by the American Law Institute be followed.

G. Pleadings Regarding Punitive Damage Claims Should Not Be Permitted To Contain a Monetary Amount.

At one time, claims for punitive damages were the exception and quite rare, but it has become more common recently for some attorneys to include such counts as a routine matter. This practice often is employed for its *in terrorem* effect. Some observers feel that the mere presence of such a count increases the settlement value of the underlying lawsuit.

A number of jurisdictions have adopted statutes which prohibit plaintiffs from pleading a claim of punitive damages until a *prima facie* showing is made regarding the defendant's potential liability for such an award. For example, Illinois permits a prayer for relief seeking punitive damages only after the plaintiff, upon motion and hearing, establishes a reasonable likelihood of proving facts at trial sufficient to sup-

62. Restatement (Second) of Agency § 217C (1958); Restatement (Second) of Torts § 909 (1979). These two provisions are identical:

Punitive Damages Against a Principal

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

- (a) the principal or a managerial agent authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act

63. 2 J. Ghiardi & J. Kircher, *supra* n. 24, § 24.07; W. Prosser & W.P. Keeton, *supra* n. 41 at 13.

port an award of punitive damages.⁶⁴ Florida, Idaho and Minnesota have adopted similar statutes.⁶⁵ California, however, has adopted a statute that merely prohibits a plaintiff from including a monetary figure in the pleadings.⁶⁶ These procedures are in contrast to those of most states, which continue to permit plaintiffs to include claims for punitive damages and to include monetary figures for such in the original complaint. In those states, the defendant may move to dismiss the claim or may endeavor to limit discovery of wealth or financial condition until later in the proceedings. The various approaches described make clear that the issue essentially is one of placing the initial burden. Should the plaintiff have to make some type of showing that the facts could support an award of punitive damages before being permitted to plead a claim for punitive damages?

The Committee concluded that there was no good reason to put the burden on the plaintiff to make a *prima facie* showing before being permitted to plead a claim for punitive damages, but that the California modification should be followed. The Committee noted the growing tendency for pleadings to include very large monetary amounts, the fact that these figures are arbitrary in many instances, and the unwarranted adverse publicity involved, and found that little purpose was being served by the present system. Thus, the Committee recommends that no monetary figure for punitive damages should be permitted in the petition or complaint. This modification to present practice in no way inhibits a plaintiff from pursuing a claim and obtaining an award for punitive damages, yet it would protect a defendant from needless and unwarranted adverse pretrial publicity.

H. Discovery of Evidence Regarding a Defendant's Wealth or Financial Condition for the Purpose of Proving the Amount of a Punitive Award Should Not Be Permitted Without a *Prima Facie* Showing That There Is a Legal Basis for Such an Award.

The fact that a plaintiff necessarily must engage in efforts to ascertain the facts involved in a case does not mean that all efforts at discovery should be permitted at the outset of a case that might involve a punitive damages issue. Initial efforts at discovering facts regarding liability are clearly necessary and would have to be permitted even in a jurisdiction that prohibits a plaintiff from initially pleading a claim for punitive damages. However, to subject a defendant to unlimited discovery regarding wealth or financial condition at the outset poses great potential for unwarranted invasions of privacy and other abuses.

The Committee on Special Problems recommends that the discovery of evidence regarding a defendant's wealth or financial condition for the purpose of proving the amount of a punitive award should not be permitted without a *prima facie* showing by the plaintiff that there is a reasonable likelihood of proving facts at the trial sufficient to support a determination of liability for such damages. Where it appears from the complaint or upon motion that evidence of wealth or financial condition is relevant to the issue of liability for punitive damages, the burden of persuading the court to limit dis-

64. Ill. Rev. Stat. ch. 110, para. 2-604.1 (Supp. 1988).

65. Fla. Stat. § 768.72 (Supp. 1988); Idaho Code § 6-1604 (Supp. 1987); and Minn. Stat. Ann. § 549.191 (West 1988).

66. Cal. Civ. Code § 3295 (Supp. 1988).

covery should be where it rests in most jurisdictions today. The defendant must move to limit discovery in this situation and convince the court such evidence is not relevant to the liability issue. Where the evidence is only relevant to the amount of the punitive award, the burden should be on the plaintiff to obtain permission from the court to engage in discovery of wealth or financial condition. This would put the burden on the plaintiff to make a *prima facie* showing that there is a plausible case for a punitive award. Defendants would be protected from unwarranted intrusions into their records and private affairs and from being unnecessarily inconvenienced, unnecessary expenses would be avoided by all concerned, and no real impediment or obstacle would be placed in the path of plaintiffs who are entitled to pursue legitimate claims for punitive damages.

I. Bifurcated Trials Should Be Employed To Avoid Prejudice to Defendants Where Evidence of Wealth or Financial Condition Is Admissible Only on Claims for Punitive Damages.

Evidence of wealth or financial condition is ordinarily irrelevant to the liability issues in a case where punitive damages are sought. Normally, such evidence bears only on the amount of money that would adequately punish and deter. In such situations, permitting evidence of wealth or financial worth to be introduced at the stage of the trial where liability is determined needlessly provides an opportunity for bias and prejudice to operate against a defendant. However, the Committee on Special Problems recognizes that there may be some situations where evidence of wealth or financial condition might bear on the punitive damage liability issue even though it has no relevance to liability giving rise to compensatory damages. For example, the fact that the defendant is in a superior economic position and able to exert a certain authority or power over the plaintiff may be relevant to whether the conduct is sufficiently egregious to warrant punitive damages.⁶⁷

Although bifurcation of the trial is an obvious solution to this problem, it is clear that different issues would have to be separated in the two situations described. There may be other situations which would call for still different treatment, such as trifurcation. Recognizing this, the Committee recommends that the defendant be provided an opportunity to move for a division of the trial in a case where punitive damages are claimed, if undue prejudice would result from the introduction of evidence of wealth or financial condition, and that in such a case the issues be separated to afford a fair trial to all concerned.⁶⁸ The following is one approach for courts to consider.

In a trial where a punitive award is sought and evidence of wealth or financial condition has no relevance to any liability issues, the court, upon motion by the defendant, should bifurcate the trial on the following basis: During the first phase of the trial, the issues of liability should be determined and evidence of wealth or financial condition should not be permitted. In many instances, it may also be desirable to determine the

67. The Committee recognizes that there are other exceptions. Evidence of wealth or financial condition may bear on liability issues for compensatory damages as well as punitive damages issues. If this is the situation, a division of the trial may not be appropriate.

68. Several jurisdictions have adopted a bifurcated trial process for cases involving punitive damages. See, e.g., Cal. Civ. Code § 3295 (Supp. 1988), Ga. Code Ann. § 105-2002.1(d) (Supp. 1988), Mo. Ann. Stat. § 510.263 (Vernon Supp. 1988), and Mont. Code Ann. § 27-1-221(7) (1987).

issue of compensatory damages in the first phase. In either event, a special verdict form should be used to determine whether the defendant is liable for compensatory damages only, or in addition is liable for punitive damages. If the jury determines in the first phase that punitive damages also should be awarded, evidence of the appropriate amount, including that of wealth or financial condition where relevant, should be permitted in the second phase. This process would prevent undue prejudice in the situation described, but it would not be appropriate where evidence of wealth or financial condition is relevant to the issue of liability for punitive damages. In the latter case, courts should consider the procedure described below.

If a claimant sues for punitive damages and the defendant moves for a bifurcated trial, the plaintiff should be permitted to show that evidence of wealth or financial condition is relevant to the issue of liability for punitive damages. If the plaintiff prevails on this issue, the court should limit the first phase of the trial to a determination of whether the defendant is liable for compensatory damages and the amount thereof. If the jury finds liability for compensatory damages, the second phase of the trial should address the punitive damage liability issue and the amount of any such award. During the second phase of the trial, evidence of wealth or financial condition, where relevant, may be admissible. If the second type of bifurcation procedure is employed, the jury should be informed during the first phase of the trial that the plaintiff has made a claim for punitive damages, but that this issue may be addressed in a second phase of the trial after the jury has decided the issue of liability for compensatory damages.

The Committee on Special Problems has concluded that a flexible approach is needed to resolve the problem regarding undue prejudice to defendants from the introduction of evidence of wealth or financial condition during the phase of the trial dealing with liability for compensatory damages. The approaches described above will take care of most situations, but, if they do not, the court should divide the trial in other ways, possibly trifurcation, to avoid undue prejudice while, at the same time, protecting the claimant's right to pursue an award of punitive damages where the evidence would support such a claim.

J. Distribution of Punitive Awards Should Not be Diverted to Persons or Entities Other Than the Plaintiff.

There has been much discussion regarding whether all or part of a civil punitive award should be paid to someone other than the plaintiff⁶⁹ and, if so, whether there should be some restriction on the plaintiff's attorney fee. The argument for distributing the award to someone or some entity other than the plaintiff is based upon the fact that a punitive award to the plaintiff is viewed as a windfall, the plaintiff having already been fully compensated for any actual harm suffered. At first glance, the so-called "windfall" argument would seem to have some merit, but on closer examination a number of problems arise from the suggested change.

If the plaintiff is not entitled to receive any or a substantial part of the award, it is argued that there will be little incentive to bring an action for punitive damages. This would discourage lawyers from acting as "private attorneys general." Since the trier of fact might be persuaded to increase the amount of noneconomic loss in the compen-

69. See the various legislative approaches taken by different states on this subject, *supra* n. 25.

satory award if not given the opportunity to assess punitive damages, it may be that the proposal to distribute the award to someone other than the plaintiff could be circumvented. If this were to be the case, it might be ethically incumbent upon the plaintiff's attorney to seek only compensatory damages and forgo any personal or public interest in seeking a punitive award.

Assuming that the plaintiff were permitted to share in the punitive award on some substantial basis, problems still arise. How should the award be distributed? Is this to be a legislative determination, or left to the court? Does the fact that a punitive award is a "windfall" of sorts currently cause the jury, on occasion, to limit the award to an amount smaller than might otherwise be awarded? If it is distributed to an authority which levies taxes, will jurors see an opportunity to relieve the taxpayer of a burden? Even were these issues resolved, if punitive awards are limited to an amount which does not exceed twice that of any compensatory award, as recommended in subsection D, there will be fewer situations where an unseemly windfall takes place.

On balance, the Committee has concluded that the common law has long permitted the successful plaintiff to retain the punitive award, and that this is justifiable on the basis that it was the plaintiff who went to the trouble to prosecute the matter in the first place. The Committee does not see any real justification for changing the current situation. Finally, there is no more reason to change the rules with regard to the attorney-client fee arrangements in this situation than in any other area of tort litigation.

IV. THE PROBLEM OF DUPLICATIVE PUNITIVE AWARDS FOR THE SAME ACT OR COURSE OF CONDUCT.

The potential for multiple awards of punitive damages for the same act or course of conduct creates problems both for plaintiffs and defendants. From the defendant's standpoint, there is the very real possibility that the punitive awards will be duplicative and therefore result in punishing the defendant more than once for the same wrongful conduct. This obviously offends basic notions of justice. Conversely, a plaintiff runs the risk that prior punitive awards may exhaust the defendant's resources, and that, not only will there be insufficient funds from which to pay the plaintiff's punitive award, but the funds will be inadequate to pay a compensatory award. Under the current state of affairs, some defendants have resorted to bankruptcy proceedings for protection. Although this may be viewed as a limited form of protection, it is a drastic measure. Moreover, it does not address the problem of duplicative awards against a solvent defendant. In short, existing procedures are inadequate to resolve the problem satisfactorily. Although all agree that the problem needs attention and resolution, a solution is not nearly as evident as the problem.

The Committee on Special Problems has considered a number of approaches to the multiple awards problem. It is clear to the Committee that there is no simple solution. Thus, the Committee has decided that it should set out the various approaches considered, in an attempt to further discussion and facilitate debate in the hope that more efficacious approaches may eventually evolve. The Committee believes it is particularly important to follow this approach, since the American Law Institute is currently engaged in two projects that would seem to encompass the multiple awards

situation. The problem of duplicative awards most frequently arises in the context of the so-called mass tort case and involves multiparties, multiclaimes, and multiforums. Both the A.L.I. projects on complex litigation and on compensation and liability for product and process injuries provide vehicles for addressing the multiple awards problem. In addition, Congress has taken some steps to deal with the situation.⁷⁰ Since these efforts are still in the initial stages, the deliberations of the Committee may prove helpful in resolving the problem. In any event, the work of the Committee should be recorded for those who come later to the task.

A. State Solutions

At the state level, only two attempts to address the problem of multiple awards for the same act or course of conduct have resulted in legislation. Georgia has adopted a statute prohibiting multiple recoveries against one defendant in product liability actions filed in that state, but it has no effect on actions filed outside of the state.⁷¹ The effect of the Georgia statute is to allow only one punitive award — the first obtained — in that state. This award is to be deemed as sufficient punishment, regardless of the amount. No other award for punitive damages may be made thereafter in Georgia for the same conduct.

Missouri has adopted a somewhat different approach. The Missouri statute provides for a post-trial hearing wherein a defendant may file a motion "requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based."⁷² This approach is broader than the Georgia statute in several respects. The statute is not limited to product liability cases, and it permits evidence of out-of-state awards, as well as evidence of in-state awards, to reduce any award in Missouri. A subsequent proceeding is required to determine any offset.

Both the Georgia and Missouri statutes suffer from a deficiency that presently is inherent in any attempt to resolve the problem at the state level. Although state A may control what goes on within its courts, it cannot control what goes on in the courts of state B.⁷³ Neither Georgia nor Missouri can control awards that are assessed in other states, even though those awards are based on the same conduct that gave or will give rise to liability in Georgia or Missouri. Only trials or awards in Georgia or Missouri can be affected.

One possible solution to the interstate problem is for the National Conference of

70. A bill to amend title 28, United States Code, containing a number of features that would address some of the aspects of the multiple awards problem, was passed by the United States House of Representatives late in the second session of the 100th Congress, but this part of the bill was not passed by the Senate and did not become law. See Title III(A) of H. R. 4807, 100th Cong., 2d Sess., 134 Cong. Rec. H7443 (Sept. 13, 1988) and 134 Cong. Rec. S16284 (Oct. 14, 1988).

71. Ga. Code Ann. § 105-2002.1(e)(1) (Supp. 1988).

72. Mo. Ann. Stat. § 510.263 (Vernon Supp. 1988).

73. Although a state cannot control what goes on in the federal courts either, under current law a federal court would probably be required to apply the Georgia or Missouri statutes, if otherwise applicable, in diversity cases litigated in the federal courts because the statutes clearly affect substantive rights of the litigants. See 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4508 (1982).

Commissioners on Uniform State Laws to undertake a drafting project for the purpose of achieving uniformity among the states on the subject. However, not only is this approach problematic in terms of achieving uniformity in the near future, if ever, but it may be complicated by the fact that a somewhat unconventional approach might have to be employed to obtain the desired result. A type of compact or reciprocal arrangement permitting cases to be transferred from one state to another might have to be designed and utilized if there is to be but one trial of all punitive damages claims arising out of the same act or course of conduct. In any event, the state-by-state approach, while holding the possibility of improvement of the present situation, does not appear to afford a complete solution, at least for the near future.

B. Federal Solutions

1. The A.B.A. National Class Action Proposal

The A.B.A. Section of Litigation has recommended that Congress enact legislation necessary to create a national class.⁷⁴ This would permit one court to obtain jurisdiction and control over cases which expose a defendant to multiple punitive awards rising out of the same conduct which results in similar injuries. It would be a mandatory class action, in that one mass federal trial on the punitive damages issue would be binding on all concerned — those who have not sued, including those who may not yet be injured, as well as those who are parties to pending state and federal actions.⁷⁵ State court litigants who refuse to join the class would be enjoined from pursuing punitive awards based on the same conduct, but would be included in the distribution of the penal award resulting from the federal litigation.⁷⁶ The procedures envisioned could be invoked upon defendant's motion and findings by the court that "there is a reasonable possibility that adequate compensatory damages will not be available if punitive damages are not brought under control."⁷⁷ The applicable substantive law would be "federal common law" as the court determines it to be after a full hearing.⁷⁸ The proposal also addresses issues as to how the punitive award should be distributed, including the problem regarding unknown future plaintiffs.⁷⁹

Although the Committee on Special Problems is impressed with the careful thought that has gone into the A.B.A. Litigation Section proposal and views it as a partial improvement over the present system, it feels that other alternatives should also be explored. The A.B.A. proposal does not appear to address the problem of multiple awards against a solvent defendant, i.e., where the possibility of collecting adequate compensatory damages will not be affected by punitive awards. The unfairness of mulcting a defendant more than once for the same conduct does not diminish with the prospect that there may be sufficient funds to pay all awards. On the contrary, the unfairness is exacerbated. Moreover, consideration should be given to other methods of deciding what law should apply to the substantive issues short of developing federal common-law tort rules.

74. A.B.A. Sec. Litigation Report, *supra* n. 7 at 78-81.

75. *Id.* at 80.

76. *Id.* at 81.

77. *Id.* at 79.

78. *Id.* at 80.

79. *Id.* at 81.

2. Multidistrict Litigation

The Committee on Special Problems considered two other federal solutions to the multiple awards problem. First, it was suggested that Congress should enact a new statute providing jurisdiction in the federal courts for cases involving personal injury, death or property damage where two or more claims or actions seeking punitive damages are based on the same act or course of conduct of a defendant who is engaged in or affects interstate commerce. As a further jurisdictional requirement, the aggregate total of such claims, exclusive of claims for compensatory damages, should exceed \$50,000. The suggestion contemplates that only the individual claims for punitive damages would be removed and consolidated, leaving other claims, including those for compensatory damages, for trial in the courts where originally filed. The authority of Congress to enact such legislation would rest on the powers granted to it under the Commerce Clause⁸⁰ and Article III⁸¹ of the United States Constitution.

The procedures for removing cases filed in state courts⁸² and the statutes regarding multidistrict litigation in the federal courts⁸³ would need to be amended to authorize removal and transfer for the limited purpose of consolidating all punitive damage claims, whether originally filed in state or federal courts, for trial in one federal forum. Proceedings to remove, transfer, or consolidate such claims should be initiated by the federal judicial panel on multidistrict litigation upon its own motion or by motion filed with the panel by any party to an action which meets the jurisdictional requirements. The transferee court should be empowered to appoint lead counsel and to implement other measures needed to administer the litigation.

Because the jurisdiction is for multiparty, multiclaim actions, absent a legislatively created standard, the substantive law of several states and perhaps even foreign nations will often apply to different aspects of the litigation. Thus, the legislation should set forth the standards to be applied in determining punitive damages or should at least provide for a single, uniform choice-of-substantive-law procedure for claims subject to the proposed proceeding.⁸⁴ The legislation also should be drafted to

80. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ." U.S. Const. art. I, § 8.

81. "The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . ." U.S. Const. art. III, § 2.

82. 28 U.S.C. § 1441 *et seq.* (1983).

83. 28 U.S.C. § 1407 (1983).

84. Currently choice-of-law questions in so-called mass tort cases in the federal courts are determined under state law. *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See Atwood, The Choice-of-Law Dilemma in Mass Tort Litigation: Kicking Around *Erie*, *Klaxon*, and *Van Dusen*, 19 Conn. L. Rev. 9 (1986). It is contemplated that the choice of law provision in the proposed legislation would involve the development and application of a body of substantive federal law. Arguably this could satisfy the requirement that there be a federal question in order to sustain jurisdiction in the federal courts through the "Arising Under" clause of Article III of the United States Constitution. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); *Osborn v. Bank of United States*, 9 Wheat. 738 (1824). The adoption of a federal standard for determining punitive awards would more clearly satisfy this constitutional requirement.

preserve the concept of *forum non conveniens* to avoid attracting cases from all over the world to American courts when such cases would be more appropriately resolved in a foreign forum. There are a number of other matters that would need to be addressed, but this provides an outline of the basic features.

3. Interpleader

The Committee considered an alternative solution to the multiple awards problem which would require a new federal statute patterned after 28 U.S.C. § 1335, the federal interpleader statute. The proposed legislation would empower a federal district court, upon petition or motion by either a plaintiff who has filed an action seeking a punitive award or a defendant against whom an action for a punitive award has been filed, to adjudicate the issues involved in the multiple awards problem regardless of the court in which the claim or action was originally filed. The trial of the tort action in which the punitive award is sought would be carried out in the court in which it was originally filed or to which it was otherwise transferred or removed. The trial of the tort case would not be enjoined. However, the federal court in which the interpleader action was filed would have the authority to enjoin⁸⁵ the enforcement of any judgment containing an award for punitive damages and to remove or transfer jurisdiction of that part of the judgment to the federal court. Thus, any judgment which contains an award of punitive damages would be the possible subject of interpleader if the jurisdictional criteria exist.

In order for the federal court to exercise jurisdiction, the plaintiff seeking interpleader would be required to allege, by petition or motion, facts which show that there is a reasonable probability that the plaintiff will not be able to satisfy a judgment for the punitive award because the defendant's assets will be depleted by other claims for punitive awards arising out of the same act or course of conduct upon which the plaintiff's claim is based. A defendant against whom an action for a punitive award has been filed also could invoke the jurisdiction of the federal court upon a showing on the same grounds, i.e., that assets are insufficient to pay all claims. In addition, the defendant may invoke the jurisdiction of the federal court by alleging that two or more actions for punitive damages are based on the same act or course of conduct and that any such awards will be duplicative.

The current federal interpleader statute has a very low amount in controversy requirement and only requires minimal diversity of citizenship, i.e., diversity between two adverse parties.⁸⁶ These, or similar provisions in the new legislation, would suffice to provide jurisdiction for most cases involving the problems sought to be addressed. Where minimal diversity does not exist because all parties are citizens of the same state, there is a good chance all suits would be filed in the courts of that state and in that event be subject to consolidation or interpleader under the rules of those courts. Where all parties are citizens of one state, but some suits are filed in other states, the defendant could argue *forum non conveniens*.

Even though most cases would fall within diversity-of-citizenship jurisdiction, the

Committee on Special Problems considered whether federal question jurisdiction would be the preferable route, as in the multidistrict proposal.⁸⁷ Not only would federal question jurisdiction assure that all cases would be covered, but it would be necessary to set out certain substantive matters in the interpleader legislation in any event. The legislation should prescribe how the federal court shall determine whether multiple awards are duplicative and on what basis and when judgments for punitive awards may be satisfied. The court also should be authorized to hold some funds in reserve or otherwise assure that there will be assets available to satisfy claims of future plaintiffs. The basis for such a determination should be set out in the statute. Arguably, this would provide the basis for federal jurisdiction.⁸⁸

4. Comparing the Federal Solutions

The basic difference between the federal proposals involves the forum of the trial of the punitive damages claims. In the multidistrict approach, there would be one mass trial on the punitive damages claim in one federal court, because all cases could be removed from state courts and consolidated in one federal court. Although the national class action approach of the A.B.A. would leave those who refuse to join the class in the courts that would otherwise have jurisdiction, all would be bound by the result in the federal court. Under the interpleader approach, the trials of the tort actions, including the punitive damages claim would take place in the various courts that would otherwise have jurisdiction. Arguably, there would be much less inconvenience to plaintiffs regarding the trial of the tort cases under the interpleader proposal. Also, there would be no need for federal courts to have to involve themselves in new choice-of-law problems as the federal court would merely enjoin the execution of the punitive portion of the judgment. Since the punitive award does not go to compensate victims, the fact that there may be delays in distributing it should not work any hardship. Plaintiffs could nevertheless proceed to satisfy judgments regarding the compensatory awards. On the other hand, the interpleader approach may require a hearing, if not a trial, to determine whether the various punitive awards resulted from the same act or course of conduct. It may also require a hearing or trial on the issue of whether the awards are duplicative. Both the multidistrict proposal and the interpleader proposal may avoid the creation of federal common law regarding substantive tort rules whereas the national class action approach, at least as proposed by the A.B.A., contemplates some federalization of tort law. None of the proposals is perfect, but the problems may be resolved through further study.

C. The Preferred Approach

Although the problem of duplicative awards of punitive damages for the same act or course of conduct is a difficult one, the Committee has come to certain conclusions. First, a federal solution would appear to be preferable to a state-by-state enactment of a uniform or model act, because there is no assurance that every state would adopt such an act and, even if every state did, the time period that it would take to achieve near uniformity would far exceed that which Congress would require to act on the matter. Moreover, it is not clear to the Committee that the problems involved can be effectively addressed at the state level. There does not appear to be any conventional

85. This authority should be expressly set out in the legislation so that no question is raised under the federal Anti Injunction Act, § 28 U.S.C. 2283 (1982).

86. 28 U.S.C. § 1335(a) (1983).

87. See *supra* n. 84.

88. See *supra* nn. 80 & 81.

mechanism by which the states could cause cases filed in other states or the federal courts to be consolidated in a particular state court. Although the states might enter into some compact or reciprocal agreement that would permit all cases filed in the courts of the participating states to be transferred to a particular court in one of the states, this sort of arrangement would not reach cases filed in the federal courts unless Congress enacted legislation to effect such a result. The Committee believes that if Congress has to act, it might as well opt for a solution that would utilize the federal court system. The federal system already provides an existing structure and rules that are near uniform throughout the country and would appear to provide a better mechanism to handle the problems than a wholly new, if not novel, mechanism at the state level.

Of the federal solutions discussed above, the Committee prefers an approach that requires all litigants to appear in the same forum. There should be no opportunity to opt-out. This would avoid litigation subsequent to the mass trial to determine if those who opted out should be bound by the results. There would be no question that those who were parties to the multidistrict case would be bound. Any disputes as to who is a proper party should be resolved initially, not after the trial. The Committee also favors a federal choice-of-law rule, or perhaps even a federal standard, for determining punitive damages in tort cases that would be subject to the mass trial in a federal court. At the very least, the federal court should not be required to apply state choice-of-law rules in this setting.⁸⁹

The Committee concluded that the national class action as proposed by the A.B.A. Section of Litigation could be substantially improved if the jurisdictional basis is expanded to include the situation where a defendant is subject to multiple punitive awards for the same act or course of conduct without regard to any effect on the plaintiffs' ability to collect adequate compensatory damages. This would address the problems of the defendants as well as those of the plaintiffs. At this time, the Committee believes that the interpleader approach, although it may have promise, is more novel and problematic than other approaches, and that the other federal approaches stand a better chance of being perfected and accepted by the Congress. Most, if not all, problems appear to be resolvable through the multidistrict or the national class action approach, and the Committee has concluded that these concepts should be pursued along with any others that hold promise for resolving the multiple awards problem.⁹⁰

89. See Atwood, *The Choice-of-Law Dilemma in Mass Tort Litigation*, *supra* n. 84.

90. In some situations, Federal Rule of Civil Procedure 23 may provide some relief. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983) where the trial court permitted the certification of a mandatory class for punitive damages pursuant to Rule 23(b)(1)(b). The court, while casting doubt on whether punitive damages would exhaust the defendant's resources so that early claimants might deprive later claimants of the opportunity to recover compensatory damages, indicated it would be equitable to share whatever punitive damages that were allowed among all plaintiffs who ultimately recover compensatory damages rather than permitting the punitive award to go only to the early claimants. Other aspects of the decision were affirmed on appeal, but since the case was settled, the appellate court specifically refused to address the propriety of the punitive damage class certification under Rule 23(b)(1)(b). *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 167 (2nd Cir. 1987), *cert. denied*, 108 S. Ct. 2899 (1988).

V. CONCLUSION

Although there has been a substantial amount of study and discussion which has resulted in some changes with regard to the role of punitive damages in the civil justice system, the Committee on Special Problems in the Administration of Justice has concluded that there still are serious problems that have not been adequately resolved by the courts or the legislatures. This report is intended to facilitate the resolution of the problems by offering specific recommendations on these matters. In offering them, the Committee believes that the recommendations are in the best interest of all that are affected by the civil justice system in America and that the adoption of these recommendations by the various jurisdictions involved will result in definite improvements in the administration of justice in this country.⁹¹

The Board of Regents of the American College of Trial Lawyers has approved this report and has ordered that it be printed and disseminated to the Fellows of the College, the American Law Institute, the American Bar Association and others interested in the subject of punitive damages.

91. We take this opportunity to express our deep appreciation to Professor Roger Henderson for his assistance in this assignment.

Model Jury Instructions on Punitive Damages

The plaintiff in this case is seeking to recover punitive damages in addition to those damages that are designed to compensate the plaintiff for any injuries that have resulted in [e.g., lost earnings, medical expenses or conscious pain and suffering]. It is within your discretion whether to award any punitive damages. In determining whether to award punitive damages, you must comply with the following instructions. To justify an award of punitive damages, the plaintiff must persuade you by clear and convincing evidence that:

- (1) the defendant either intended to harm the plaintiff or that the defendant realized that there was a strong probability that the plaintiff would be seriously harmed;
- (2) the defendant acted with malice or with an evil mind or that the defendant's conduct was outrageous; and
- (3) the defendant deserves to be punished, deterred or made an example of because of [his][her] conduct.

Punitive damages are designed to punish and deter a defendant from intentionally or consciously harming others without any good reason or justification. Such awards also are meant to deter others from committing the same acts. The fact that the defendant may have been negligent or even extremely careless is not a sufficient reason for you to award punitive damages. To award punitive damages, you must find that the defendant acted with knowledge that [his][her] conduct would cause harm to the plaintiff or that the defendant realized that there was a strong probability that the plaintiff would be seriously harmed. If you are not persuaded by clear and convincing evidence that the defendant had this knowledge, or realization, then you may not award punitive damages against the defendant.

If you find that punitive damages are to be awarded against the defendant, you must then determine the amount to be awarded. In doing so, you must find the amount that you are persuaded by clear and convincing evidence is fair and reasonable under the circumstances. In making that finding, you may take into consideration one or more of the following factors to the extent you find them relevant:

- (1) the nature of defendant's conduct;
- (2) the impact of defendant's conduct on the plaintiff;
- (3) the relationship between the plaintiff and defendant;
- (4) the likelihood that the defendant would repeat the conduct if a punitive award is not made;
- (5) the defendant's financial condition; and
- (6) any other circumstances shown by the evidence, including any circumstances of mitigation, that bear on the question of the size of any punitive award.

The purpose of punitive damages is to punish and deter, not to vanquish or annihilate the defendant. Although there is no fixed mathematical formula for you to use in determining the amount of a punitive award, you should strive to set the amount of any award at a level that you determine imposes a fair and reasonable punishment for the amount and type of injury that you find that the defendant has caused the plaintiff.

[If you have found, under the instructions I have given you, that the conduct of _____ [an employee or agent, including one acting in a managerial capacity for a corporate entity] is such as to warrant an award of punitive damages, you should then consider whether any such award should be made against the defendant _____ [employer, principal or corporation].

If you find from the evidence that the defendant _____ [employer, principal or corporation] either authorized, participated in, consented to, acquiesced in, or ratified the actions of [the employee, agent or manager], with knowledge of their wrongful character, you may exercise your discretion to award punitive damages against _____ [employer, principal or corporation] too. [You may also consider such an award if you find from the evidence that the defendant _____ [employer, principal or corporation] was reckless in selecting _____ [employee, agent or manager] or in retaining him with knowledge that he would be likely to inflict injury of this nature.]]

(20)
No. 89-1279

Supreme Court, U.S.
FILED

JUN 1 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

**BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF PETITIONER**

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN *
McGUINNESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

*Attorneys for Amicus Curiae
Equal Employment
Advisory Council*

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. STANDARDLESS JURY DISCRETION TO AWARD PUNITIVE DAMAGES VIOLATES DUE PROCESS	6
A. Individual Justices of this Court Have Ex- pressed Well-Founded Due Process Concerns over Unlimited Jury Discretion To Award Punitive Damages	6
B. The “Unbridled Discretion” Allowed to the Jury in this Case To Award Punitive Dam- ages Violates Due Process	9
II. UNRESTRICTED PUNITIVE DAMAGES AWARDS THREATEN THE NATION’S EM- PLOYMENT LAWS	11
A. Unlimited Punitive Damages Are Available in Employment-Related Claims Under Fed- eral and State Law	11
B. Punitive Damages Awards in the Employ- ment Context Are “Skyrocketing”	13
C. The Absence of Reasonable Restrictions on Punitive Damages Awards Frustrates the Remedial and Conciliatory Policies Inherent in Federal Labor and Employment Law	16
D. Unrestricted Punitive Damages Awards En- danger the Ability of American Businesses To Manage the Workforce and Compete in the International Marketplace	20

TABLE OF CONTENTS—Continued

	Page
III. <i>RESPONDEAT SUPERIOR</i> IS NOT AN APPROPRIATE SOLE BASIS FOR LIABILITY FOR UNRESTRICTED PUNITIVE DAMAGES AWARDS AGAINST EMPLOYERS.....	21
A. Innocent Employers Would Be Extremely Vulnerable If Punitive Damages Could Be Imposed in Employment Cases Solely on the Basis of <i>Respondeat Superior</i>	21
B. Even If Punitive Damages Can Be Awarded in Employment Cases, This Court Should Adopt Standards That Credit Employer Efforts To Prevent Discrimination as Mitigating Factors	24
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	17
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974)	18
<i>American Motor Sales Corp. v. Murphy</i> , 570 F.2d 1227 (5th Cir. 1978)	2
<i>Autrey v. Blue Cross and Blue Shield of Alabama</i> , 481 So. 2d 345 (Ala. 1985)	22
<i>Bankers Life and Casualty Company v. Crenshaw</i> , 486 U.S. 71 (1988)	8, 9, 10
<i>Barrett v. Omaha National Bank</i> , 726 F.2d 424 (8th Cir. 1984)	25
<i>Beauford v. Sisters of Mercy-Province of Detroit, Inc.</i> , 816 F.2d 1104 (6th Cir. 1987)	13
<i>Browning-Ferris Industries v. Kelco Disposal, Inc.</i> , 109 S.Ct. 2909 (1989)	6, 7, 8, 9, 10, 13
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	28
<i>Consolidated Edison Co. v. NLRB</i> , 305 U.S. 197 (1938)	17
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	7
<i>Dean v. American Security Insurance Company</i> , 559 F.2d 1036, cert. denied, 434 U.S. 1066 (1978)	18
<i>Dent v. West Virginia</i> , 129 U.S. 114 (1889)	7
<i>DiSilva v. Polaroid Corp.</i> , No. 8828 (N.D. Mass. App. Div. January 4, 1985)	28
<i>Foley v. Interactive Data</i> , 47 Cal. 3d 654 (1988)	21
<i>Ford Motor Company v. EEOC</i> , 458 U.S. 219 (1982)	3
<i>Franks v. Bowman Transportation Company Inc.</i> , 424 U.S. 747 (1976)	17
<i>General Building Contractors Association, Inc. v. Pennsylvania</i> , 458 U.S. 375 (1982)	22
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	6, 9, 14
<i>Gilardi v. Schroeder</i> , 672 F. Supp. 1043 (N.D. Ill. 1986), aff'd 833 F.2d 1226 (7th Cir. 1987)	11
<i>Grant v. Monsanto Co.</i> , 51 Fair Empl. Prac. Cases (BNA) 1593 (S.D. Ohio 1989)	11

TABLE OF AUTHORITIES—Continued

	Page
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977)	7
<i>International Brotherhood of Electrical Workers v. Foust</i> , 442 U.S. 42 (1979)	9, 14, 15
<i>International Brotherhood of Teamsters v. U.S.</i> , 431 U.S. 324 (1977)	2
<i>Johnson v. Al Tech Specialties Steel Corp.</i> , 731 F.2d 143 (2d Cir. 1984)	19
<i>Johnson v. Railway Express Agency, Inc.</i> , 421 U.S. 454 (1975)	11, 19
<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 409 (1968)	19
<i>Layman v. Xerox</i> , No. CA3-87-1733 (N.D. Tx., Dallas Div. 1990)	14
<i>Meritor Savings Bank, FSB v. Vinson</i> , 477 U.S. 57 (1986)	24, 25
<i>Miller v. Bank of America</i> , 600 F.2d 211 (9th Cir. 1979)	22
<i>Mitchell v. Keith</i> , 752 F.2d 385 (9th Cir.), <i>cert. denied sub nom. General Motors Corporation v. Mitchell</i> , 472 U.S. 1028 (1985)	23
<i>NLRB v. J.H. Rutter-Rex Manufacturing Co.</i> , 396 U.S. 258 (1969)	17
<i>Patterson v. McLean Credit Union</i> , 109 S.Ct. 2363 (1989)	2, 11, 19
<i>Pearson v. Western Electric Company</i> , 542 F.2d 1150 (10th Cir. 1976)	17
<i>Ramsey v. American Air Filter Co., Inc.</i> , 772 F.2d 1303 (7th Cir. 1985)	15
<i>Rawson v. Sears Roebuck & Co.</i> , 822 F.2d 908 (10th Cir. 1987), <i>cert. denied</i> , 484 U.S. 1006 (1988)	3
<i>Richerson v. Jones</i> , 551 F.2d 918 (3d Cir. 1977)	17
<i>Rodgers v. Fisher Body Div., G.M.C.</i> , 739 F.2d 1102 (6th Cir. 1984), <i>cert. denied</i> , 470 U.S. 1054 (1985)	15
<i>Rogers v. Exxon Research & Engineering Co.</i> , 550 F.2d 834 (3d Cir. 1977), <i>cert. denied</i> , 434 U.S. 1022 (1978)	18

TABLE OF AUTHORITIES—Continued

	Page
<i>Sant v. Mack Trucks, Inc.</i> , 424 F. Supp. 621 (N.D. Cal. 1976)	19
<i>Shah v. Mt. Zion Hospital and Medical Center</i> , 642 F.2d 268 (9th Cir. 1981)	17
<i>Sims v. Kaneb Services, Inc.</i> , No. 8602474 (Harris County, Texas District Court) (<i>settled during pendency of motion for new trial</i>)	14
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	10, 13, 24
<i>Stephens v. South Atlantic Cannery, Inc.</i> , 848 F.2d 484 (4th Cir.), <i>cert. denied</i> , 109 S.Ct. 564 (1988)	13
<i>Stockley v. AT & T Information Systems, Inc.</i> , 687 F. Supp. 764 (E.D.N.Y. 1988)	28
<i>Swentek v. USAir, Inc.</i> , 830 F.2d 552 (4th Cir. 1987)	25
<i>Trans World Airlines v. Thurston</i> , 469 U.S. 111 (1985)	19
<i>United Mine Workers of America v. Gibbs</i> , 383 U.S. 720 (1966)	20
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979) ..	10
<i>Vance v. Southern Bell Telephone and Telegraph Co.</i> , 863 F.2d 1503 (11th Cir. 1989)	15, 23
<i>Constitutional Amendment</i>	
U.S. Constitutional Amendment XIV, § 1	6
<i>Federal and State Statutes</i>	
Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 <i>et seq.</i>	18, 19
29 U.S.C. § 626(b)	19
National Labor Relations Act, 29 U.S.C. §§ 151-168	16, 17, 19
29 U.S.C. § 160(c)	17
Title VII of the Civil Rights Act of 1964, <i>as amended</i> , 42 U.S.C. § 2000e <i>et seq.</i>	5, 11, 17, 19, 23
42 U.S.C. § 2000e(b)	22
42 U.S.C. § 2000e-2	17
Section 1981, 42 U.S.C. § 1981	<i>passim</i>

TABLE OF AUTHORITIES—Continued

	Page
Alabama Code § 6-11-21 (Supp. 1988)	10
Alabama Code § 6-11-27 (Supp. 1988)	10
Ill. Rev. Stat. Ch. 110, para. 2-1207 (1988)	15
New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1 <i>et seq.</i> , as amended February 8, 1990, A.B. 2872)	11
<i>Federal Bills</i>	
S. 2104, 101st Cong., 2d Sess. § 8 (1990)	12
H.R. 4000, 101st Cong., 2d Sess. § 8 (1990)	12
<i>Federal Regulations</i>	
29 C.F.R. § 1604.11 (a) (3)	24
29 C.F.R. § 1604.11 (d)	27
<i>Legislative History</i>	
Hearings on S. 2104, the Civil Rights Act of 1990, Before the Senate Labor and Human Resources Committee, 101st Cong., 2d Sess. (March 1, 1990)	20, 21
Hearings on H.R. 4000, the Civil Rights Act of 1990, before the House Education and Labor Committee and Subcommittee on Civil and Con- stitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess. (March 13, 1990)	20
110 Cong. Rec. 6549 (1964)	17
<i>Miscellaneous</i>	
6A Moore's Federal Practice ¶ 59.08[6] (2d Ed. 1989)	15
Administrative Management Society Foundation, 1988-89 AMS Hiring & Firing Policies Survey (1989)	20
B. Schlei & P. Grossman, <i>Employment Discrimina- tion Law</i> (2d ed. 1983)	17

TABLE OF AUTHORITIES—Continued

	Page
<i>Brief of the Equal Employment Opportunity Com- mission as Amicus Curiae In Support Of De- fendant's Motion For Summary Judgment, Stockley v. AT&T Information Systems, Inc., (No. 86 Civ. 1643 (RJD) E.D.N.Y.)</i>	27
I. Shepard, P. Heylman, and R. Duston, <i>Without Just Cause: An Employer's Practical and Legal Guide on Wrongful Discharge</i> (1989)	12
L. G. Crovitz, <i>Absurd Punitive Damages Also 'Mock' Due Process</i> , Wall Street Journal, March 14, 1990, at A19	6
M. Peterson, S. Sarma, M. Shanley, <i>Punitive Dam- ages: Empirical Findings</i> (1987)	14
The Remedial Scheme of Existing Federal Em- ployment Legislation, <i>An Assessment of Rem- edies: The Impact of Compensatory and Puni- tive Damages on Title VII</i> , National Foundation for the Study of Employment Policy (1990)	16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

**On Writ of Certiorari to the
Supreme Court of Alabama**

**BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF PETITIONER**

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae. The written consents of all parties have been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of the petitioner before this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in

the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, all of EEAC's members, and the constituents of its trade association members, are subject to claims to, punitive damages under a variety of federal and state laws and common law causes of action, including 42 U.S.C. § 1981, some state fair employment practices laws, and some state law tort actions arising out of the employment relationship. Moreover, Congress is presently considering legislation that would make punitive damages awardable in a much wider range of employment discrimination litigation.

Thus, several of the issues presented for review in this case are extremely important to the nationwide constituency which EEAC represents. The court below upheld a jury award of over \$1,000,000 in punitive damages against Pacific Mutual on a theory of *respondeat superior* even though the jury was given virtually no guidance in assessing an appropriate award. Employers are particularly vulnerable to claims based on *respondeat superior* and their financial exposure under the various laws mentioned above will be greatly increased if this Court now holds that standardless jury awards of punitive damages are constitutional. Therefore, EEAC's members have a direct interest in the outcome of this case.

Because of its interest in issues involving damage awards under the nation's labor and employment laws, EEAC has participated as *amicus curiae* in several such cases, including *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977) (appropriateness of remedies); *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989) (scope of § 1981); *American Motor Sales*

Corp. v. Murphy, 570 F.2d 1227 (5th Cir. 1978) (punitive damages under ADEA); *Ford Motor Company v. EEOC*, 458 U.S. 219 (1982) (tolling of back pay liability under Title VII); *Rawson v. Sears Roebuck & Co.*, 822 F.2d 908 (10th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) (size of jury award in state law claim).

EEAC seeks to assist the Court in this case by highlighting the impact its decision may have beyond the insurance industry, and particularly in the field of employment litigation. Accordingly, this brief brings relevant matter to the attention of this Court that has not already been brought to its attention by the parties. Because of its significant experience, EEAC is uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondents are employees of Roosevelt City, a small Alabama community. Pet. App. B1.¹ Lemmie Ruffin was a soliciting agent for several insurance companies, including Petitioner Pacific Mutual and Union Fidelity, which is not a party to this case. Pet. App. A2. Ruffin contacted the City about providing insurance for its employees after its group health insurance policy was cancelled by another carrier. Pet. App. B1. He wrote the city a group life insurance policy with Pacific Mutual and a group health insurance policy with Union Fidelity. Pet. App. B2.

Ruffin used Pacific Mutual letterhead for correspondence on both policies, and all communications were handled through the Birmingham Pacific Mutual office. Pet. App. B2-B3. Insurance premiums were collected from the employees by payroll deduction and paid over to Ruffin, who pocketed them. *Id.* Both policies were

¹ Citations to the Petition for Certiorari and Petitioner's Appendix are designated as Pet. -- and Pet. App. — respectively.

cancelled for nonpayment of premium. *Id.* Respondent Cleopatra Haslip learned of the cancellation only after she had entered the hospital and incurred \$2,500 in charges as well as additional medical bills that were turned over to a collection agency. *Id.* at B3.

Haslip and other participants sued Pacific Mutual and Ruffin for fraud. *Id.* Ruffin did not appear at the trial. Pet. 3. The jury awarded \$1,040,000 to Haslip, \$12,400 to Cynthia Craig, \$15,290 to Alma Calhoun and \$10,288 to Eddie Hargrove. Pet. App. B3. The trial court denied Pacific Mutual's motion for remittitur. Pet. App. A16. The Supreme Court of Alabama upheld the award. Pet. App. B1-B13. In particular, the Alabama court rejected Pacific Mutual's argument that the award was unconstitutional as a violation of due process. Pet. App. B12-B13. Justices Maddox and Steagall dissented in part, concluding that the punitive damages award violated Pacific Mutual's rights under the Fourteenth Amendment. Pet. App. B14-B16.

SUMMARY OF ARGUMENT

As various individual Justices of this Court have observed, unrestrained jury discretion to award punitive damages presents a significant issue under the Due Process Clause. Lacking any guidance as to the appropriate monetary range within which to set an award, juries are left to wander blindly amid concepts of punishment and deterrence, groping in the dark for a suitable amount. Such standardless discretion offers a defendant no warning of its potential liability, and no Constitutional safeguards, even though punitive damages are "quasi-criminal" in nature.

Standardless jury discretion to award punitive damages is of substantial concern to employers. Punitive damages are available in employment-related claims under federal and state laws such as Section 1981, 42 U.S.C. § 1981, state fair employment practice statutes,

and various state tort laws that have been put to use in employment cases. In addition, pending legislation in Congress would add punitive damages to the existing panoply of remedies available under Title VII of the Civil Rights Act of 1964. Juries have awarded exorbitant sums as punitive damages in employment-related claims. As shown by the instant case, judicial authority to modify such awards cannot be relied upon to block such abuses.

Moreover, unrestricted punitive damages awards are antithetical to the remedial and conciliatory goals of federal labor and employment laws. Legislation such as Title VII and the forerunner of its remedial provisions, the National Labor Relations Act, seeks not to "punish" employers but merely to make individuals whole through equitable remedies such as reinstatement and back pay. A primary goal of Title VII is the resolution of differences through conciliation rather than litigation. By holding out the hope of a large dollar jury award, the availability of unrestricted punitive damages operates as a serious disincentive to conciliation.

Further, the continued escalation of unrestrained punitive damages awards poses a serious threat to employers' ability to manage employees, and eventually to the competitiveness of American businesses in the international marketplace. Faced with the possibility that a jury's whim will result in an exorbitant award, employers will be inclined to retain poor performers rather than risk costly terminative litigation. Exorbitant punitive damages awards can only increase the costs of goods and services, reduce efficiency in the marketplace, threaten the very existence of some businesses, and eventually eliminate jobs.

In addition, the court below authorized the imposition of a punitive damages award against an employer solely on the basis of the doctrine of *respondeat superior*. In the employment law context, use of *respondeat superior* to support a punitive award is particularly inappropriate.

ate, since employers can be held liable for the discriminatory acts of their employees even though the employer took reasonable steps to prevent such conduct. Even if punitive damages can be awarded under the doctrine in employment law cases, jury discretion should be limited by instructions that employer efforts to prevent discrimination are a mitigating factor.

ARGUMENT

I. STANDARDLESS JURY DISCRETION TO AWARD PUNITIVE DAMAGES VIOLATES DUE PROCESS

A. Individual Justices of this Court Have Expressed Well-Founded Due Process Concerns over Unlimited Jury Discretion To Award Punitive Damages

In Justice O'Connor's words, "[a]wards of punitive damages are skyrocketing." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2903, 2924 (1989) (O'Connor, J., concurring in part and dissenting in part). A rarity no more than thirty years ago, punitive damages have now become routine, and there have been at least six awards in excess of \$20 million since the Court's decision in *Browning-Ferris* last year. L. Gordon Crovitz, *Absurd Punitive Damages Also 'Mock' Due Process*, Wall Street Journal, March 14, 1990, at A19.

Juries frequently receive little or no guidance as to the appropriate size of a punitive damages award. "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). As punitive damages awards escalate, the question arises whether these awards can withstand scrutiny under the Due Process Clause of the Fourteenth Amendment, U.S. Const. Amend. XIV, § 1, which "prohibits any state deprivation

of life, liberty or property without due process of law." *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

The groundwork for this challenge was laid in two prior cases in which the Court considered, but did not decide, the issue. *Browning-Ferris, supra*, involved a challenge to the sheer size of a jury's \$6 million punitive damages award in an antitrust case. The majority of the Court found that applicability of the Due Process Clause was not properly before the Court, and thus did not rule on that issue. *Id.* at 2921.² Justices Brennan and Marshall, while concurring with the Court's opinion upholding the award, did so with the understanding that the majority had not foreclosed a subsequent holding that the Due Process Clause restricts punitive damages in private civil cases.

Observing that prior Supreme Court decisions had "indicate[d] that . . . the Due Process Clause forbids damages awards that are 'grossly excessive' . . . or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable,'" *id.* at 2923 (Brennan, J., concurring) (citations omitted), Justice Brennan pinpointed the inherent problem in allowing punitive damage awards without any restrictions or guidance. "Without statutory (or at least common law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision." *Id.* Justice Brennan noted that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986), quoting *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)) and warned:

² The case was decided on the basis that the Excessive Fines Clause of the Eighth Amendment is inapplicable to punitive damages awards in cases between private parties.

I for one would look longer and harder at an award of punitive damages based on such skeletal guidance [as a jury instruction on punitive damages that stated only to take into account the character of the defendants, their financial standing and the nature of their acts] than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.

Id.

Justice O'Connor expressed similar concerns in her concurring and dissenting opinion in which she was joined by Justice Stevens. Noting as had Justice Brennan that the issue remained open, Justice O'Connor recalled an earlier opinion in which she had commented upon "the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." *Browning-Ferris, supra*, at 2924 (O'Connor, J., concurring in part and dissenting in part) (recalling *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71 (1988)).

In *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71 (1988), the Court did not reach claims that a \$1,600,000 punitive damages verdict for an insurer's bad faith refusal to pay a claim violated the Excess Fines, Due Process and Contract Clauses. Instead, the Court held only that the state penalty statute under which the damages were awarded did not violate the Equal Protection Clause. In her concurring opinion, Justice O'Connor agreed with the majority that the Court should not decide the Due Process issue, but expressed a strong view that a punitive damages award could be struck down in an appropriate case as violative of the Due Process Clause.

Justice O'Connor scrutinized a Mississippi law that allows a jury to award unlimited punitive damages for any common law tort if it finds that the defendant has acted willfully or intentionally, or with gross and reckless negligence. She explained that, "In my view, because

of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause." *Id.* at 87.

As did Justice Brennan's concerns in *Browning-Ferris*, Justice O'Connor's apprehensions centered upon the lack of any criteria to guide the jury as to what amount, if any, might appropriately be awarded as punitive damages. "Punitive damages are awarded not to compensate for injury, but, rather, 'to punish reprehensible conduct and to deter its future occurrence,'" Justice O'Connor explained. *Id.*, (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). "Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, 'the impact of these windfall recoveries is unpredictable and potentially substantial.'" *Id.* (quoting *International Brotherhood of Electrical Workers v. Foust*, 422 U.S. 42, 50 (1979)).

Justice O'Connor criticized the lack of specificity in the Mississippi law, stating that while it "may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate." *Id.* at 1656. Accordingly, Justice O'Connor concluded, "this grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Id.*

B. The "Unbridled Discretion" Allowed to the Jury in this Case To Award Punitive Damages Violates Due Process

The instant case raises precisely the same issues noted by Justices Brennan and O'Connor in *Browning-Ferris* and *Bankers' Life*. Here, the jury was instructed, "Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs." Pet. 15-16 (quoting RT 898). Such "guidance," as Justice Brennan observed in

Browning-Ferris, "is scarcely better than no guidance at all, [and] . . . reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Browning-Ferris, supra* at 2923 (Brennan, J., concurring).

As Chief Justice Rehnquist has said, "although punitive damages are 'quasi-criminal,' . . . their imposition is unaccompanied by the types of safeguards present in criminal proceedings." *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (citation omitted). "The Court has recognized that 'vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.'" *Bankers Life, supra*, at 88 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). Here, Pacific Mutual was afforded literally no safeguards at all—no maximum limit on the fine, no sentencing guidelines, no recognition that its involvement in the "crime" was peripheral at best.

Nor was Pacific Mutual afforded the protection of Alabama's recently enacted legislative restrictions on punitive damages awards, which include a cap of \$250,000, Alabama Code § 6-11-21 (Supp. 1988)) and limitations on liability of a principal for acts of an agent. Alabama Code § 6-11-27 (Supp. 1988). Either or both of these provisions could have limited substantially, if not eliminated, the liability of Pacific Mutual for punitive damages in this case. In effect, the jury here was cast adrift and invited to "do what they think is best." As several Justices of this Court have recognized, this type of standardless discretion may not withstand scrutiny under the Due Process Clause.

II. UNRESTRICTED PUNITIVE DAMAGES AWARDS THREATEN THE NATION'S EMPLOYMENT LAWS

A. Unlimited Punitive Damages Are Available in Employment-Related Claims Under Federal and State Law

The issue presented here, whether due process is violated by a standardless award of punitive damages, is of substantial importance to employers throughout the United States. Employers can be, and have been, held liable for punitive damages for causes of action arising out of the employment relationship on a number of grounds. 42 U.S.C. § 1981 prohibits racial discrimination in the "making and enforcement" of employment contracts, *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), and punitive damages are available. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Some states have adopted "fair employment practices" laws that substantially parallel the coverage of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Of these, a few provide expressly for punitive damages by statute. See, e.g., New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1 *et seq.*, as amended February 8, 1990, A.B. 2872). Others have been interpreted judicially to provide for punitive damages awards. *Grant v. Monsanto Co.*, 51 Fair Empl. Prac. Cases (BNA) 1593 (S.D. Ohio 1989) (compensatory and punitive damages available under Ohio Fair Employment Practice Law).

In addition, many states allow employees to pursue common law causes of action in tort arising out of incidents in the workplace. For instance, in addition to Title VII liability, a sexual harassment claim can give rise to a tort claim under state law for intentional infliction of emotional distress or even assault and battery, which in turn can lead to an award of punitive damages.³ Also,

³ See, e.g., *Gilardi v. Schroeder*, 672 F. Supp. 1043 (N.D. Ill. 1986), *aff'd* 833 F.2d 1226 (7th Cir. 1987) (\$12,960.50 in back pay

the traditional doctrine of employment-at-will has been eroded significantly in recent years through judicially-created exceptions such as "tort claims of wrongful discharge in violation of public policy, contract based claims of wrongful discharge in violation of an employer's policies, and a new tort of abusive or wrongful discharge." I. Shepard, P. Heylman, and R. Duston, *Without Just Cause: An Employer's Practical and Legal Guide on Wrongful Discharge* 17 (1989). Punitive damages are generally available under tort theories, and while contract claims do not usually support such a recovery, some states allow an award of punitive damages on a theory of "tortious or bad faith breach of contract." *Id.* at 212.

Moreover, Congress is now considering legislation that would amend Title VII to provide for compensatory and punitive damages. Section 8 of the Civil Rights Act of 1990 would give Title VII claimants the opportunity to collect punitive damages "if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the Federally protected rights of others" S. 2104/H.R. 4000, 101st Cong., 2d Sess. § 8 (1990). No further guidance is provided.

Except in the few states that have placed statutory caps on punitive damages awards, or the even fewer states that have barred punitive damages entirely,⁴ juries

under Title VII and \$50,000 in compensatory and \$50,000 in punitive damages on state tort claims of battery and intentional infliction of emotional distress awarded to sexual harassment plaintiff).

⁴ Respondents' brief in opposition to the Petition for Certiorari summarized state restrictions on punitive damages awards, concluding that "[n]ine states have enacted legislation capping punitive awards," *Respondents Brief In Opposition* at 20 (footnote with citations omitted), and that "Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington have abolished punitive damages except where explicitly authorized by statute." *Id.* at n. 35 (citations omitted).

are given virtually no guidance as to what amount of punitive damages might be appropriate.⁵ Likewise, while the Circuit Courts of Appeals have adopted for Section 1981 cases the standard of "reckless or callous disregard for plaintiff's rights, as well as intentional violations of federal law" set by this Court in *Smith v. Wade*, 461 U.S. at 51, as appropriate to trigger a punitive damages awards in Section 1983 cases,⁶ Section 1981 affords no guidance to a jury as to the appropriate size of an award.

Thus, employers are exposed on several fronts to unrestricted punitive damages awards of the type at issue in this case. In a claim arising out of the employment relationship, as in any other case, guidance to the jury to the effect that "you may take account of the character of the defendants, their financial standing, and the nature of their acts . . . is scarcely better than no guidance at all." *Browning-Ferris*, 109 S.Ct. 2909, 2923 (Brennan, J., concurring).

B. Punitive Damages Awards in the Employment Context Are "Skyrocketing"

There can be no question that punitive damages awards, particularly in the business context, are increasing by leaps and bounds. A 1987 RAND Study, *Punitive Damages: Empirical Findings*, reported massive increases in the number and size of punitive damages awards in busi-

⁵ Respondents cite to state statutes offering procedural safeguards such as standards for judicial review of an award, mandatory or permissive bifurcations, limitations on admissibility of evidence of defendants' financial resources, and requirements for court approval before a complaint can demand punitive damages, but do not offer any such safeguards concerning the size of punitive damages awards. *Id.* at 21.

⁶ See, e.g., *Stephens v. South Atlantic Cannery, Inc.*, 848 F.2d 484, 489 (4th Cir.), cert. denied, 109 S.Ct. 564 (1988); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir. 1987).

ness/contract cases, including employment claims, between 1960 and 1984.⁷

Recent awards in the employment field alone are staggering. A jury in Harris County, Texas District Court awarded \$31,000,000 (reduced to approximately \$21,000,000) to an accountant who claimed that his former employer wrongfully fired him after he refused to sign what he believed were fraudulent tax returns. *Sims v. Kaneb Services, Inc.*, No. 8602474 (Harris County, Texas District Court) (settled during pendency of motion for new trial). A former Xerox employee who claimed that the new job she was offered after her old position was discontinued was not what she had been promised won a jury award of \$139,716 in compensatory damages and \$8,750,000 punitive damages on a pendent state fraud claim, along with \$145,000 back pay on an age discrimination claim. *Layman v. Xerox*, No. CA3-87-1733 (N.D. Tx., Dallas Div. 1990) (post-trial motions pending).

These and other exorbitant awards clearly bear "no . . . relation to the actual harm caused," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974),⁸ and are "be[ing] employed to punish unpopular defendants." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42,

⁷ M. Peterson, S. Sarma, M. Shanley, *Punitive Damages: Empirical Findings* at vi (1987). The study examined jury verdicts in Cook County, Illinois, and San Francisco, California, from 1960 to 1984 and other California jurisdictions from 1980 to 1984. It reports that the number of punitive damages awards in business/contract cases, which it defines to include employment-related cases, "doubled in Cook County and tripled in San Francisco County between the later 1970s and early 1980s." *Id.* The study also reported extraordinary growth in the size of such awards. "In the first five years of the late 1980s, juries in each jurisdiction awarded about three times the total awarded in the previous ten years." *Id.* at 24 (emphasis in original).

⁸ In *Gertz v. Robert Welch, Inc.*, this court disallowed punitive damages in defamation suits by private citizens who cannot meet the "actual malice" test.

50 n. 14 (1979).⁹ In each of these cases, the only rational explanation for the massive award is that the jury sought to punish a large employer by granting the plaintiff a windfall far in excess of actual damages.

Admittedly, federal courts generally have discretion to set aside an excessive jury verdict and order a new trial, or to order remittitur of a portion of the verdict that it finds to be excessive. See generally 6A Moore's Federal Practice ¶ 59.08[6] (2d ed. 1989).¹⁰ Similar procedures are available in the states. See, e.g., Ill. Rev. Stat. Ch. 110, para. 2-1207 (1988) (granting trial court statutory authority to order remittitur and conditional new trial in case of excessive jury award of punitive damages).

As the instant case exemplifies, however, this authority is not a guarantee, as the reviewing courts also are without adequate standards. Here, while conceding that it would likely have awarded less, the trial court denied Pacific Mutual's motion for remittitur. Pet. App. A14-A16. Even though the actual damages here were minimal, and in some cases nonexistent, the trial court concluded that the award was not "based upon bias, passion, corruption, or other improper motive," and must there-

⁹ In *International Brotherhood of Electrical Workers v. Foust*, this Court held that "[punitive] damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance." *Id.* at 52.

¹⁰ See also *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503 (11th Cir. 1989) (upholding lower court's grant of judgment notwithstanding the verdict and in the alternative for a new trial on grounds, *inter alia*, that jury award of \$2,500,000 in claim under 42 U.S.C. § 1981 was excessive); *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1314 (7th Cir. 1985) (granting new trial on issue of punitive damages in employment discrimination action under 42 U.S.C. § 1981 unless plaintiff agrees to remittitur from \$150,000 to \$20,000); *Rodgers v. Fisher Body Div., G.M.C.*, 739 F.2d 1102, 1109 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (reversing and remanding \$500,000 punitive damages award under 42 U.S.C. § 1981 for new trial).

fore be allowed to stand. Pet. App. A15. The Supreme Court of Alabama affirmed, citing Alabama law which presumes jury verdicts to be correct and strengthening that presumption when a motion for new trial is refused by the trial judge. Pet. App. B13.

Accordingly, employers cannot always depend upon post-trial motions to keep jury awards within the bounds of reason. Thus, the absence of reasonable restrictions on jury awards of punitive damages, as shown by the instant case, raises serious concerns for EEAC's members.

C. The Absence of Reasonable Restrictions on Punitive Damages Awards Frustrates the Remedial and Conciliatory Policies Inherent in Federal Labor and Employment Law

Unrestricted punitive damages awards are particularly inappropriate because of the unique nature of employment disputes. Unlike typical tort and contract claims, employment controversies do not take place between strangers. The plaintiff and defendant in an automobile accident case generally never met before they collided. The parties to an ordinary breach of contract claim have no ties other than the contract itself. In contrast, most labor and employment disputes involve individuals and companies with an ongoing relationship that began before the dissension and is expected to continue after the parties' differences are resolved.

In keeping with this premise, the remedies provided by Congress to redress violations of federal labor and employment laws follow a consistent pattern. See generally, *The Remedial Scheme of Existing Federal Employment Legislation, An Assessment of Remedies: The Impact of Compensatory and Punitive Damages on Title VII*, National Foundation for the Study of Employment Policy (1990). The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-168, which prohibits discrimination against

employees involved in union activity, offers individual employees "make-whole" remedies that are designed to restore the injured party to the status he or she would have enjoyed had the violation not occurred. See generally, *NLRB v. J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969). These remedies include a cease and desist order, reinstatement and back pay, 29 U.S.C. § 160(c), but not compensatory or punitive damages. B. Schlei & P. Grossman, *Employment Discrimination Law* 1452 (2d ed. 1983). See also *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938).

Title VII prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2. The provisions of Title VII which afford remedies to individuals were "expressly modeled on the backpay provision of the [NLRA]"¹¹ and thus provide make-whole remedies such as an injunction, reinstatement and back pay, but not compensatory or punitive damages.¹²

Like the NLRA, Title VII encourages conciliation and resolution rather than litigation.

Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those

¹¹ *Albermarle Paper Co. v. Moody*, 442 U.S. 405, 419 and n. 11 (1975) ("the framers of Title VII stated that they were using the NLRA provision as a model."). See also 110 Cong. Rec. 6519 (1964) (remarks of Sen. Humphrey); *id.* at 7214 (Interpretative memorandum by Sens. Clark and Case). *Franks v. Bowman Transportation Company Inc.*, 424 U.S. 747, 769 (1976) (describing the NLRA as "the model" for Title VII remedies provision).

¹² *Shah v. Mt. Zion Hospital and Medical Center*, 642 F.2d 268 (9th Cir. 1981); *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977) (punitive damages not available under NLRA, on which Title VII was patterned); *Pearson v. Western Electric Company*, 542 F.2d 1150, 1152 (10th Cir. 1976) ("Title VII was not enacted to seek to punish the responsible party, but rather to compensate the victim of discrimination.").

practices and devices that discriminate on the basis of race, color, religion, sex, or national origin Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation and persuasion before the aggrieved party was permitted to file a lawsuit.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis added).

The availability of unrestricted punitive damages seriously hampers these conciliation efforts. Federal judges, who are ideally situated to observe the effects of different remedial schemes on the volume of litigation and the willingness of the parties before them to settle, have found general damages awards to be a serious impediment to conciliation and settlement in employment litigation.¹³ As these judges have observed, the hope of a "big

¹³ The potential effect on the conciliation process of the availability of an unquantified damages remedy was best expressed by courts that wrestled in the late 1970's and early 1980's with the issue of whether compensatory damages could be recovered under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, which authorizes the award of both "legal" and "equitable" relief. These courts agreed that the hope of such awards would "severely cripple the mediation process." *Dean v. American Security Insurance Company*, 559 F.2d 1036, 1039 n. 8 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). See *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) ("Haggling over an appropriate sum could become a three-sided conflict among the employer, the [EEOC], and the claimant."); *Dean, supra*, at 1039 ("The silence of the Act with respect to general damages is entirely consistent with legislative intent to abstain from introducing a volatile ingredient into the tripartite negotiations involving [EEOC], employee and employer which might well be calculated to frustrate rather than to 'effectuate the purposes' of the Act."); *Johnson v.*

ticket" damages award at trial is a major disincentive to conciliation.

While punitive damages generally are not available under Title VII, the Age Discrimination in Employment Act¹⁴ and other federal labor and employment statutes,¹⁵ plaintiffs frequently add pendent state claims to discrimination complaints under federal law. *Cf. United Mine*

Al Tech Specialties Steel Corp., 731 F.2d 143, 147 (2d Cir. 1984) ("If an individual alleging discrimination knew he could recover compensatory damages if he refused to settle during the administrative process and commenced a civil suit, he would have little incentive to resolve the dispute during the conciliation process."); *Sant v. Mack Trucks, Inc.*, 424 F. Supp. 621 (N.D. Cal. 1976) ("If large tort recoveries are allowable under the ADEA, it is doubtful that alleged age discriminatees will enter into good faith conference and conciliation when around the corner lies the possibility of large dollar pain and suffering recoveries.").

¹⁴ The Age Discrimination In Employment Act does provide for "liquidated damages" in cases of "willful" violations, but these damages are strictly limited to an amount equal to the "unpaid compensation." 29 U.S.C. § 626(b). Moreover, a "willful" violation occurs only when the employer acts with "knowing or reckless disregard for whether or not the challenged conduct violated the Act." *Trans World Airlines v. Thurston*, 469 U.S. 111, 128 (1985).

¹⁵ Although Section 1981, 42 U.S.C. § 1981, provides remedies including punitive damages for racial discrimination in the "making and enforcement" of employment contracts, *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), it should not be considered a "labor and employment law" in the same category as the NLRA and Title VII because, unlike those laws, it was not developed as such. Section 1981 was not used in any meaningful manner in the employment context until more than a hundred years after its enactment. In 1968, this court held for the first time that Section 1981 provided a right to an individual to sue for racial discrimination in private as well as public, sale or rental of property. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). It was not until 1975 that this court stated that Section 1981 affords a federal remedy against discrimination in private employment on the basis of race. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Thus, Section 1981 was not considered a labor or employment law when either the NLRA or Title VII was adopted.

Workers of America v. Gibbs, 383 U.S. 720 (1966) (doctrine of pendent jurisdiction). These state law claims often afford a punitive damages remedy where federal law does not. See discussion pp. 11-12, *supra*. The possibility of an unrestricted punitive damages award under state law thus has the same deleterious effect on conciliation efforts as would the availability of such an award under the federal statute itself.

D. Unrestricted Punitive Damages Awards Endanger the Ability of American Businesses To Manage the Workforce and Compete in the International Marketplace

Unrestricted punitive damages awards in the employment context can be expected to affect seriously the competitiveness of American businesses. A number of witnesses testifying before Congress in opposition to the proposal to add compensatory and punitive damages remedies to Title VII have warned of the bill's potential effect on American industry's ability to compete in the international marketplace. Both James C. Paras, testifying on behalf of the U.S. Chamber of Commerce, and Ralph H. Baxter, a San Francisco employment lawyer, agreed that expansion of Title VII remedies and the resultant increase in litigation would compel employers to retain marginal or unsatisfactory employees for fear that termination would result in costly litigation.¹⁶ Mr. Paras

¹⁶ Hearings on S. 2104, the Civil Rights Act of 1990, Before the Senate Labor and Human Resources Committee, 101st Cong., 2d Sess. (March 1, 1990) (statement of James C. Paras at 21); Hearings on H.R. 4000, the Civil Rights Act of 1990, before the House Education and Labor Committee and Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess. (March 13, 1990) (statement of Ralph H. Baxter, Jr. at 7). Indeed, a recent survey by the AMS Foundation found that 42% of employers already feel that the potential for wrongful discharge litigation is a threat to management's ability to manage employees. Administrative Management Society Foundation, 1988-89 *AMS Hiring & Firing Policies Survey* at 13 (1989).

also noted that "[b]y producing unreasonably large verdicts, [compensatory and punitive damages under Title VII] will increase the costs of goods and services, make the market less efficient, and reduce the availability of jobs."¹⁷

These arguments are no less applicable to the current availability of unrestricted punitive damages awards as they continue to climb. As Mr. Paras mentioned, when it decided in 1988 that compensatory and punitive damages should not be recovered in most wrongful discharge cases, the California Supreme Court stated, "the expansion of tort remedies in the employment context has potentially enormous consequences for the stability of the business community."¹⁸

Unrestricted punitive damages awards, which continue to escalate, will soon reach the point where they threaten the competitiveness of American industries. Accordingly, EEAC's members are extremely concerned that such awards, which represent a windfall to plaintiffs far in excess of actual harm, will be permitted to continue unchecked unless this Court establishes standards requiring the punishment more realistically to fit the offense.

III. RESPONDEAT SUPERIOR IS NOT AN APPROPRIATE SOLE BASIS FOR LIABILITY FOR UNRESTRICTED PUNITIVE DAMAGES AWARDS AGAINST EMPLOYERS

A. Innocent Employers Would Be Extremely Vulnerable If Punitive Damages Could Be Imposed in Employment Cases Solely on the Basis of *Respondeat Superior*

The decision of the Alabama Supreme Court below gives employers further cause for concern because of the

¹⁷ March 1, 1990 Senate Hearings, *supra* note 16 (statement of James C. Paras at 21).

¹⁸ *Foley v. Interactive Data*, 47 Ca. 3d 654, 669 (1988).

manner in which it applied the doctrine of *respondeat superior* to hold Pacific Mutual liable for punitive damages for the acts of its agent. The court below approved and quoted at length the trial court's discussion of Alabama law, stating:

"The Supreme Court of Alabama has repeatedly stated that a corporation is liable for the torts of its employees, both agent, and servant, based upon the principle of *respondeat superior*, not the doctrine of agency. 'The factual question to be determined is whether the act complained of was done either by agent or servant while acting within the course and scope of his employment; the corporation or principal may be liable in tort for the acts of its servants or agents done within the scope of employment, real or apparent, even though it did not authorize or ratify such acts or even expressly forbade them.'"

Pet. App. B7, quoting Pet. App. A7, quoting *Autrey v. Blue Cross and Blue Shield of Alabama*, 481 So. 2d 345 (Ala. 1985).

While the court below was dealing with the issue of intentional fraud rather than intentional discrimination in employment, its finding that the doctrine of *respondeat superior* can support an unrestricted jury award of punitive damages causes serious alarm among EEAC's members. Employers have been held responsible for the acts of their supervisory employees under Title VII, which defines "employer" as "a person engaged in an industry affecting commerce . . . and any agent of such a person . . .". 42 U.S.C. § 2000e(b).¹⁹ While this Court has not directly ruled on the issue,²⁰ courts of appeals have held that *respondeat superior* applies to cases

¹⁹ See, e.g., *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979).

²⁰ In *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982), this court assumed, but did not decide, that *respondeat superior* applies to § 1981 cases.

brought under 42 U.S.C. § 1981. See, e.g., *Vance v. Southern Bell Telephone and Telegraph Company*, 863 F.2d 1503 (11th Cir. 1989) (employer can be liable under Title VII or § 1981 through *respondeat superior* for harassing activities of co-worker if employer knew or should have known and failed to take remedial action); *Mitchell v. Keith*, 752 F.2d 385 (9th Cir.), cert. denied sub nom. *General Motors Corp. v. Mitchell*, 472 U.S. 1028 (1985) (liability under § 1981 can be imposed under doctrine of *respondeat superior* for the actions of a managerial employee, applying California law).

Under the theory espoused by the court below, employers would be extremely vulnerable to liability for punitive damages based upon the doctrine of *respondeat superior*, even though an employer had no reason to know of the unlawful conduct and certainly would not have condoned it if it had, and even if the employer had taken steps to prevent it. Few claims of intentional discrimination are the result of a vote of the corporate board of directors.

On the contrary, personnel decisions are usually made by an employee with supervisory authority, but at a level much below the Chief Executive Officer. Similarly, harassment claims normally originate from the offensive behavior of a supervisor, a co-employee or even a non-employee, not corporate management. Supervisory misconduct should not be the basis for punitive damage awards against an employer when the individual supervisor acts without authorization, where the misconduct is contrary to company policy, where the company had no way of knowing of the misconduct, where the misconduct is not condoned, or where the company acts to discipline the supervisor or provide an avenue of recourse to the victim.

B. Even If Punitive Damages Can Be Awarded in Employment Cases, This Court Should Adopt Standards That Credit Employer Efforts To Prevent Discrimination as Mitigating Factors

This Court previously has held, in the sexual harassment context, that employers cannot always be held strictly liable for the actions of supervisors. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). This rule is equally, if not more, relevant to liability for punitive damages. As Chief Justice Rehnquist has observed, punitive damages are rationalized as punishment, as deterrence, and as a "bounty" to encourage litigation. *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). Where an employer has made substantial efforts to prevent the harm complained of, none of these purposes is served by a punitive damages award against that employer.

Thus, standards are necessary to establish when, if ever, an employer may be liable for punitive damages based solely upon the doctrine of *respondeat superior*. While such standards are imperative now because employers may be vulnerable to punitive damages under state law, *see* discussion pp. 11-12, *supra*, they will be crucial if legislation is enacted to allow recovery of punitive damages under Title VII.

The sexual harassment context provides a particularly appropriate model for examination. Sexual harassment in the workplace can occur in two circumstances: "quid pro quo," where the offender is in a position of authority and ties acceptance of sexual advances to advancement or other economic benefits, and "hostile environment," where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Vinson, supra*, at 65, quoting EEOC guidelines on sexual harassment, 29 C.F.R. § 1604.11(a) (3). The federal courts consistently have held employ-

ers strictly liable in cases of "quid pro quo" harassment by supervisory employees. *Vinson, supra*, at 72-73.

As noted above, however, this Court has refused to hold employers automatically liable in "hostile environment" cases where the offender is a supervisor, and thus presumably would not do so where such an environment was created by a co-employee. The Court suggested that factors such as (1) the existence of a specific policy prohibiting sexual harassment, (2) whether the policy is communicated to employees in a manner that encourages them to report harassing behavior, (3) whether and when the employer learned of the misconduct and (4) if the employer's response was adequate, might mitigate against a finding of liability. *Vinson, supra* at 72-75. Accordingly, federal courts since *Vinson* have based their decisions on these factors.²¹ Thus, if an employer can demonstrate that it made a substantial effort to prevent the existence of a "hostile environment" it may be insulated from liability.

There may be situations, however, where an employer took reasonable steps to promote and implement an anti-harassment policy but was unsuccessful in preventing harassing behavior in a particular case. For example, a supervisor might ignore company policy and request sexual favors in exchange for a promotion recommendation. A co-employee with full knowledge of the company's policy could refuse to take it seriously and continue to tease another worker. If an employer is held strictly liable for "quid pro quo" harassment or falls short of the necessary proof to avoid "hostile environment" liability, the victim may be entitled to back pay

²¹ *See, e.g., Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) (employer not liable for "hostile environment" sexual harassment under Title VII when it took immediate action, including investigation and discipline, upon receipt of complaint); *Barrett v. Omaha National Bank*, 726 F.2d 424 (8th Cir. 1984) (same).

and other equitable remedies currently available under Title VII.

It does not follow, however, that an employer should also be liable for punitive damages under these circumstances. Punitive damages are intended to punish wrongdoers and deter future unlawful conduct. If an employer has devoted substantial effort to implementing an anti-harassment policy but was unable to prevent the disobedience of an errant employee, it would serve no purpose to punish the employer. Thus, in cases where punitive damages are available, the employer's efforts should be considered as negating, or at least mitigating against, such an award. At the very least, the charge to the jury should direct the jury to take the employer's efforts into account.

For example, evidence that the employer has established a strong policy forbidding sexual harassment, has communicated that policy to supervisors and rank-and-file alike, and has indicated its intent to punish those who disobey, should be relevant to show that the company does not condone harassment. Thus, such evidence should distinguish and separate the company's liability from that of an individual supervisor or employee who in effect has engaged in willful misconduct. Indeed, imposing punitive damages against the employer in this situation would be nothing more than dipping into an innocent "deep pocket."

Likewise relevant is evidence that the company's policy encouraged employees to report incidents of harassment, including methods to bypass the direct supervisor if that person is also the harasser. An employee's failure to come forward to take advantage of the anti-harassment policy must then negate or mitigate against a punitive damages award. The plaintiff's refusal to make use of an available recourse that could have remedied the situation must be taken into consideration in mitigation of a punitive damages award.

In addition, where the affected employee does not make use of an anti-harassment policy and the employer has no reason to know that harassing behavior is occurring, the employer's lack of knowledge must also be considered a mitigating factor. In this situation, punitive damages are particularly inappropriate. Without actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect itself from actions contrary to company policy, even if it has a comprehensive anti-harassment policy. Punitive damages would serve no purpose, since there is no employer conduct to be deplored and deterred.

Finally, the conduct of an employer who is informed of harassing behavior is extremely relevant to mitigation of any punitive damages award. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough and bona fide investigation, reached a rational conclusion and took appropriate action, should be credited with those efforts. Indeed, the EEOC has strongly supported such actions. The agency's Guidelines take the position that employers who take "immediate and appropriate" corrective action are not liable for the acts of co-employees. 29 C.F.R. § 1604.11(d).

Moreover, the agency has argued in litigation that statements made in the course of investigating a sexual harassment report should be accorded a qualified privilege in a defamation suit by an offending employee. *Brief of the Equal Employment Opportunity Commission as Amicus Curiae In Support Of Defendant's Motion For Summary Judgment, Stockley v. AT&T Information Systems, Inc.*, (No. 86 Civ. 1643 (RJD) E.D.N.Y.)²²

²² The court adopted the EEOC's position. *Stockley v. AT & T Information Systems, Inc.*, 687 F. Supp. 764, 769 (E.D.N.Y. 1988). *Accord DiSilva v. Polaroid Corp.*, No. 8828 (N.D. Mass. App. Div. January 4, 1985).

It also could be argued that an employer who conducts a complete investigation and reaches a well-supported, bona fide judgment that sexual harassment has not occurred, and thus takes no action against the accused employee, should receive credit for its efforts even if a trier of fact later disagrees with its conclusion.

"Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Thus, as the purpose of punitive damages is to punish a wrongdoer and deter future unlawful conduct, it stands to reason that such awards should be severely limited, if not forbidden, when an employer made a good faith effort to prevent the unlawful conduct but was unable to do so. Accordingly, this Court should reject any *per se* rule that would allow a jury unrestricted discretion to award punitive damages solely on the basis of *respondeat superior*. Instead, if the Court finds that such awards are appropriate under any circumstances, it should adopt reasonable standards, including taking into account employer efforts to prevent unlawful behavior by subordinates as mitigating factors.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decision of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN *
MCGUINNESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae
Equal Employment
Advisory Council
* Counsel of Record

June 1, 1990

(21)
No. 89-1279

Supreme Court, U.S.

FILED

JUN 1 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

**BRIEF FOR THE CENTER FOR CLAIMS RESOLUTION
AS AMICUS CURIAE SUPPORTING PETITIONER**

JOHN D. ALDOCK
(Counsel of Record)
LAURA S. WERTHEIMER
J. THEODORE GENTRY
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

*Attorneys for Amicus Curiae
Center for Claims Resolution*

Of Counsel:

PETER C. COLEMAN

EDMUND K. JOHN

CENTER FOR CLAIMS RESOLUTION

116-300 Village Boulevard

Princeton, New Jersey 08540

(609) 520-6800

June 1, 1990

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THE DUE PROCESS STANDARD FOR DETER- MINING EXCESSIVENESS SHOULD ALLOW FOR CONSIDERATION OF ANY PRIOR PUNI- TIVE DAMAGES AWARDS IMPOSED ON A DEFENDANT FOR THE SAME CONDUCT.....	3
A. Mass Tort Cases Present Unique Problems.....	4
B. This Court Should Adopt An Excessiveness Standard That Allows For Consideration Of Multiple Punitive Awards For The Same Conduct	8
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:

	Page
<i>Cimino v. Raymark Industries, Inc.</i> , No. B-86-0456-CA (E.D. Tex., March 28, 1990) (reprinted in <i>Asbestos Litigation Reporter</i> , April 6, 1990) ..	7
<i>Froud v. Celotex Corp.</i> , 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982), <i>rev'd on other grounds</i> , 98 Ill. 2d 324, 456 N.E.2d 131 (1983)	12
<i>IBEW v. Foust</i> , 442 U.S. 42 (1979)	9
<i>In re A.H. Robins Co.</i> , 89 B.R. 555 (E.D. Va. 1988)	6
<i>In re "Agent Orange" Product Liability Litigation</i> , 100 F.R.D. 718 (E.D.N.Y. 1983), <i>mand. denied sub nom. In re Diamond Shamrock Chems. Co.</i> , 725 F.2d 858 (2d Cir. 1984)	10, 11, 12
<i>In re Baltimore City Personal Injury & Wrongful Death Asbestos Cases</i> , No. 89236704 (Md. Cir. Ct. for Baltimore City) (April 24, 1990) (reprinted in <i>Mealey's Litigation Reports—Asbestos</i> (May 4, 1990))	7
<i>In re Fibreboard Corp.</i> , 893 F.2d 706 (5th Cir. 1990)	7
<i>In re Johns-Manville Corp.</i> , 36 B.R. 743 (Bankr. S.D.N.Y. 1984), <i>aff'd</i> , 52 B.R. 940 (S.D.N.Y. 1985)	5-6
<i>In re Northern Dist. of Cal. "Dalkon Shield" IUD Products Liability Litigation</i> , 526 F. Supp. 887 (N.D. Cal. 1981), <i>rev'd on other grounds</i> , 693 F.2d 847 (9th Cir. 1982), <i>cert. denied</i> , 459 U.S. 1171 (1983)	10
<i>In re Raymark Industries, Inc.</i> , 99 B.R. 298 (Bankr. E.D. Pa. 1989)	5
<i>In re School Asbestos Litigation</i> , 789 F.2d 996 (3d Cir.), <i>cert. denied</i> , 479 U.S. 852 (1986)	4, 10, 12
<i>Johnson v. Celotex Corp.</i> , No. 89-7484 (2d Cir. March 20, 1990)	12
<i>Juzwin v. Amtorg Trading Corp.</i> , 705 F. Supp. 1053, <i>modified</i> , 718 F. Supp. 1233 (D.N.J., 1989)	9, 10, 11, 12
<i>Lassiter v. Department of Social Servs.</i> , 452 U.S. 18 (1981)	2, 9

TABLE OF AUTHORITIES—Continued

	Page
<i>Leonen v. Johns-Manville Corp.</i> , 717 F. Supp. 272 (D.N.J. 1989)	10
<i>Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	9
<i>Racich v. Celotex Corp.</i> , 887 F.2d 393 (2d Cir. 1989)	10, 12
<i>Roginsky v. Richardson-Merrell, Inc.</i> , 378 F.2d 832 (2d Cir. 1967)	8, 10-11
<i>Simpson v. Pittsburgh Corning Corp.</i> , No. 89-7742 (2d Cir. April 16, 1990)	12
<i>Statutes:</i>	
Cal. Labor Code Ann. § 6425 (West 1989)	10
Cal. Labor Code Ann. § 6428 (West 1989)	10
Ga. Code Ann. § 51-12-5.1(e) (1) (Supp. 1989)	11
Mo. Ann. Stat. § 510.263 (Vernon Supp. 1990)	11-12
Tex. Health & Safety Code Ann. § 502.012(f) (Vernon 1990)	10
<i>Miscellaneous:</i>	
<i>Asbestos Litigation Reporter</i> (June 2, 1989)	7
Jeffries, <i>A Comment on the Constitutionality of Punitive Damages</i> , 72 Va. L. Rev. 139 (1986)	5
Massey, <i>The Excessive Fines Clause and Punitive Damages: Some Lessons from History</i> , 40 Vand. L. Rev. 1233 (1987)	4
<i>Mealey's Litigation Reports—Asbestos</i> (Sept. 23, 1988)	5
<i>New York Times</i> , May 16, 1990	5
Owen, <i>Problems in Assessing Punitive Damages Against Manufacturers of Defective Products</i> , 49 U. Chi. L. Rev. 1 (1982)	5
Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice, American College of Trial Lawyers (March 3, 1989)	5
Seltzer, <i>Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control</i> , 52 Fordham L. Rev. 37 (1983)	5, 6

TABLE OF AUTHORITIES—Continued

	Page
<i>Special Project—An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation</i> , 36 Vand. L. Rev. 573 (1983)	6
<i>Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures</i> , 69 Va. L. Rev. 269 (1983)	4
<i>Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation</i> , 40 Ala. L. Rev. 919 (1989)	6, 12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

**BRIEF FOR THE CENTER FOR CLAIMS RESOLUTION
AS AMICUS CURIAE SUPPORTING PETITIONER**

INTEREST OF AMICUS CURIAE

The Center for Claims Resolution (the “Center”) is a non-stock, not-for-profit corporation representing 20 companies that are defendants in asbestos personal injury litigation.¹ The Center was formed in October 1988

¹ The companies in the Center are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Certain-Teed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Flexitallic Gasket Co., Inc.; GAF Corp.; IU North America, Inc.; Maremont Corp.; National Gypsum Co.; National Services Industries, Inc.; Nosroc Corp.; Nuturn Corp.; Pfizer, Inc.; Quigley Co., Inc.; Shook & Fletcher Insulation Co.; T&N, PLC; Union Carbide Corp.; and United States Gypsum Co.

to deal with the unprecedented explosion in asbestos-related litigation. It represents its members in personal injury cases on a consolidated basis, thereby reducing litigation costs and facilitating settlement. The Center's goal is to settle claims for fair value. Thus, in its first 18 months of operation, the Center resolved—through settlement and dismissal—over 30,000 personal injury claims. Where settlement has not been possible, the Center has defended its members, to date trying approximately 100 cases to verdict.

Punitive damages are a substantial concern for the Center's members. As of March 1990, 71,000 cases were pending against the Center's members; virtually all of these suits include a claim for punitive damages. In essence, the punitive damages claims made against each Center member seek to punish it for the same conduct, because each such claim is predicated on allegations that the particular Center member knew of the potential hazards of asbestos but failed to warn of them. Absent some change in the law, the Center expects that almost all future actions against its members will likewise seek punitive damages. The constant threat of punitive damages in cases pending nationwide gives the Center a vital interest in the outcome of this case and a perspective on the punitive damages issue that may prove useful to the Court.²

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment requires "fundamental fairness" in our legal proceedings, *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 24 (1981). One of the issues in this case is whether the Due Process Clause imposes substantive limits on the amount of punitive damages that may be awarded against a defendant in a particular case for a single wrongful course of conduct.

² Written consents to the filing of this brief from the parties have been filed with the Clerk of the Court.

In framing the standards for such an excessiveness inquiry under the Due Process Clause, the Court should take note of the class of cases arising from mass tort litigation, where a single defendant can be held liable for punitive damages over and over again for precisely the same conduct. While the question of how the excessiveness inquiry should take account of multiple punitive damages awards imposed against a defendant for the same conduct is not presented here, we urge the Court to adopt a standard that does not foreclose consideration of prior punitive damages awards in assessing the excessiveness of a particular award.

In the mass tort setting, the constitutionality of any one punitive damages award cannot be judged by examining it in isolation. Excessiveness must instead be determined by reference to *all* the punishment that a defendant has suffered for the conduct in question. Otherwise, a defendant could be subjected to aggregate punishment for the same course of conduct in amounts that are constitutionally excessive, even though no single award might be so large as to be fundamentally unfair.

ARGUMENT

THE DUE PROCESS STANDARD FOR DETERMINING EXCESSIVENESS SHOULD ALLOW FOR CONSIDERATION OF ANY PRIOR PUNITIVE DAMAGES AWARDS IMPOSED ON A DEFENDANT FOR THE SAME CONDUCT

One issue presented in this case is whether the award of punitive damages against Petitioner Pacific Mutual is excessive under the Due Process Clause. For the reasons stated in the briefs for Petitioner and supporting *amici*, we believe that the award in this case was excessive and should be set aside.

In considering the standards that should govern whether an award is excessive, however, the Court should bear in mind a situation that is not present in the case

at bar, but that has become common and will be affected by the Court's decision in this case. Our concern relates to "the increasingly prevalent mass tort situation . . . [where] a defendant [is exposed] to repetitious punishment for the same culpable conduct." *In re School Asbestos Litigation*, 789 F.2d 996, 1004 (3d Cir.), cert. denied, 479 U.S. 852 (1986). We raise this concern because we expect that it might be urged that an award of punitive damages in a given case is not excessive, so long as that award is reasonably related to the compensatory damages awarded in the case.³ In the mass tort setting, the imposition of punitive damages based on a seemingly reasonable relationship to the compensatory damages awarded in each particular case could result in punitive judgments that are grossly excessive in the aggregate. Accordingly, we urge the Court to adopt a standard for determining excessiveness that does not foreclose consideration of prior awards of punitive damages imposed on a defendant for the same conduct in a case where that factor is present.

A. Mass Tort Cases Present Unique Problems.

Mass tort litigation is the result of a national market for mass-produced products. Whenever a product distributed to many thousands of users has been found to injure some users, the result can easily be thousands of products liability suits brought in numerous state and federal forums by other users allegedly harmed by the product. Typically, each user files a separate claim seeking compensatory and punitive damages against the same defendant, and the multiplicity of actions creates a significant

³ Some commentators have suggested that punitive damages would be reasonable if they do not exceed a prescribed multiple (typically three) of compensatory damages. See, e.g., Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1273-74 (1987); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 314-20 (1983).

potential for multiple awards of punitive damages against a defendant for the same act or course of conduct.⁴

Asbestos products liability litigation is the leading example of such mass tort litigation. To date, more than 150,000 cases have been filed nationwide against various asbestos miners and product manufacturers,⁵ and new claims are being filed nationwide against Center members alone at the rate of 2000 per month. The gravamen of these claims is that the defendants allegedly knew or should have known of a possible link between asbestos and health hazards, but did not warn users of such dangers. Punitive damages totalling millions of dollars have been assessed repeatedly against a number of defendants as punishment for alleged misconduct with respect to asbestos warnings. In the asbestos context, multiple punitive awards, imposed decades after the allegedly wrongful conduct, punish officers who did not participate in such conduct and shareholders who did not benefit from it. The size of such aggregate punitive awards, when added to the tens of thousands of large compensatory damages awards, have helped to drive asbestos producers into bankruptcy.⁶

⁴ See, e.g., Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice, American College of Trial Lawyers, at 20-26 (March 3, 1989); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147 (1986); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 52-53 (1982).

⁵ *New York Times*, May 16, 1990, at D1, col. 4.

⁶ For instance, three plaintiffs who obtained a \$75 million judgment for punitive damages against Raymark Industries, Inc., instituted involuntary bankruptcy proceedings against it. *Mealey's Litigation Reports—Asbestos* (Sept. 23, 1988), at 3-5. The company's motion to dismiss the petition was denied. *In re Raymark Industries, Inc.*, 99 B.R. 298 (Bankr. E.D. Pa. 1989). See also *In re*

The asbestos product liability litigation is not unique. Mass tort litigation has arisen with respect to numerous products distributed nationwide. Examples of these mass torts include litigation involving MER/29, an anti-cholesterol drug⁷; DES, a prescription drug prescribed to prevent miscarriages⁸; bendectin, a prescription drug used to control morning sickness⁹; the Dalkon Shield intrauterine birth control device¹⁰; and a particular car transmission alleged to slip out of park into reverse.¹¹ The multiple claims filed with respect to each product generally alleged that it was defective in design or that there was a failure to warn, and it appears that most actions

Johns-Manville Corp., 36 B.R. 743, 745-46 (Bankr. S.D.N.Y. 1984), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985), where the bankruptcy petition asserted that the exposure faced by Johns-Manville in asbestos litigation threatened its solvency and viability; as of the bankruptcy filing, litigation had resulted in ten punitive damages awards against it at an average of \$616,000 per verdict.

⁷ More than 1,500 suits were filed nationwide against the manufacturer, Richardson-Merrell. *Special Project—An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 704 & n.828 (1983).

⁸ Approximately 1,000 suits were filed against the manufacturers. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 920 (1989).

⁹ More than 1,900 suits have been filed against the manufacturers. *Id.* at 920-21.

¹⁰ Approximately 14,000 cases have been filed against the manufacturer, A.H. Robins. *Id.* at 921. In 1985, when A.H. Robins declared bankruptcy, the company had settled some 9,200 cases for a total of \$550 million, had paid or appealed punitive damages awards totalling over \$23 million, and still faced over 5,000 claims for compensatory and punitive damages. *In re A.H. Robins Co.*, 89 B.R. 555, 557-58 (E.D. Va. 1988).

¹¹ Approximately 700 suits were filed against Ford Motor Co., the manufacturer of the transmission. Seltzer, *supra* note 4, 52 Fordham L. Rev. at 38 n.5.

sought punitive damages as well as compensatory damages.

Defendants in such cases can be exposed to overwhelming punitive damages liability. A striking illustration of this special problem can be seen in the punitive damages imposed by a jury verdict in *Cimino v. Raymark Industries, Inc.*, No. B-86-0456-CA (E.D. Tex., March 28, 1990) (verdict form reprinted in *Asbestos Litigation Reporter* (April 6, 1990) at 20787).¹² Phase I in *Cimino* included a consolidated trial of the defendants' liability for punitive damages to all 2,336 plaintiffs, as well as a trial on the compensatory damages claims of ten of the plaintiffs. The jury determined that four defendants were liable for punitive damages and should be assessed such damages at multipliers ranging from 1.5 to 3 times the award of compensatory damages.¹³ The jury also awarded total compensatory damages of \$3.5 million to the nine plaintiffs who were awarded damages.¹⁴

¹² The trial court in *Cimino* consolidated for disposition the asbestos actions of 2,336 plaintiffs. While it vacated part of the district court's trial plan prior to the trial by issuing a writ of mandamus, the Fifth Circuit upheld the consolidated trial on punitive damages liability. *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990).

¹³ None of the defendants assessed punitive damages in *Cimino* is a Center member.

¹⁴ The procedure employed in *Cimino* is being employed elsewhere. A West Virginia Circuit Court in *In re Asbestos Cases* has followed a similar procedure and assessed punitive damages against 3 defendants at 3 times the amount of compensatory damages awarded to 315 claimants. Nos. 84-C-3321 *et al.* (W. Va. Cir. Ct. for Kanawha County), *Asbestos Litigation Reporter* (June 2, 1989) at 19093. A Maryland Circuit Court has also recently consolidated several thousand cases for a trial on defendants' liability for punitive damages, and proposes to ask the jury to determine the appropriate multiplier for any punitive damages award. *In re Baltimore City Personal Injury & Wrongful Death Asbestos Cases*, No. 89236704 (Md. Cir. Ct. for Baltimore City) (April 24, 1990) (reprinted in *Mealey's Litigation Reports—Asbestos* (May 4, 1990) at A-1, A-17).

While details on the application of these punitive damages multipliers to the remaining 2,300 cases have yet to be determined, the final awards against each defendant could easily run into the hundreds of millions, if not billions, of dollars.¹⁵ Few, if any, companies could survive punitive damages of such amounts. And these cases represent a small fraction of the asbestos personal injury litigation pending nationwide in state and federal courts in which those four defendants are participating. Thus, the imposition of punitive damages based on even a seemingly modest multiplier of compensatory damages can lead, in the mass tort context, to multiple punitive damages awards against a defendant for the same course of conduct that are clearly excessive.

B. This Court Should Adopt An Excessiveness Standard That Allows For Consideration Of Multiple Punitive Awards For The Same Conduct.

A seemingly reasonable relationship between the amount of punitive damages awarded in a single case and the amount of compensatory damages awarded in that case is thus an inadequate basis for determining the lack of excessiveness in the mass tort context. As Judge Friendly noted, in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967), a products liability lawsuit against the maker of the drug MER 29, "[t]he legal difficulties engendered by [hundreds of] claims for

¹⁵ The district court in *Cimino* has not decided whether the multiplier adopted by the jury in the consolidated trial for each defendant applies to the entire award of compensatory damages to an individual plaintiff or only to the particular defendant's share of that award. If one assumes that the average total compensatory award in the remaining 2,300 cases is \$300,000 and that the multiplier applies only to the defendant's share, the aggregate punitive damages award for a defendant with a 15% share (typical for the defendants assessed punitive damages in *Cimino*) could range from \$155 million (multiplier of 1.5) to \$310 million (multiplier of 3). These figures would escalate into the billions of dollars if the multiplier applies to the entire award of compensatory damages.

punitive damages . . . are staggering . . . [since] if all [claimants] recovered punitive damages in the amount here awarded, these would run into tens of millions."

Uncontrolled multiple awards of punitive damages against a single defendant for the same course of conduct offend the requirement of fundamental fairness imposed by the Due Process Clause. *E.g.*, *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 24 (1981). Punitive damages are not designed to compensate plaintiffs, but instead are imposed to punish the defendant and to deter it and others from similar conduct in the future. *E.g.*, *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). As this Court has recognized, the receipt of punitive damages is therefore a "windfall" to any plaintiff. *E.g.*, *Newport v. Fact Concerts, Inc.*, 453 U.S. at 267; *IBEW v. Foust*, 442 U.S. 42, 50 (1979). In the mass tort setting, punitive damages are also a windfall to the first few plaintiffs who recover them, as contrasted to later plaintiffs who may face a bankrupt defendant.

In the mass tort setting, however, there is no mechanism to control the aggregate level of such "windfall" awards of punitive damages in multiple actions. Each jury awards punitive damages for wrongful conduct that affected an entire class of injured parties without knowledge of prior punitive awards imposed to punish the same conduct.¹⁶ The punitive damages award in even one of these actions might well constitute a sufficient punishment and deterrent for the conduct that gave rise to all of them. When punitive awards in a series of separate actions involving the same conduct are considered together, the aggregate awards result "in windfall awards to individual plaintiffs at the expense of a disproportion-

¹⁶ It is no answer to suggest that the jury should be instructed on the amounts of prior punitive damages awards. Any such instruction is more likely to prejudice than to protect a defendant. See *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1056 & n.1, modified, 718 F. Supp. 1233 (D.N.J. 1989).

ately punished defendant.”¹⁷ Thus, evaluation of each award in isolation will not protect defendants against the unfairness of multiple punitive damages awards.

Moreover, the amounts of multiple punitive damages awards are enormous when compared against the statutory civil penalties for comparable misconduct. As we have seen, the aggregate punitive damages for a defendant in *Cimino* could run into the hundreds of millions of dollars. In sharp contrast, the maximum statutory penalty imposed by the Texas legislature on a manufacturer that proximately causes injury to a person by knowingly failing to warn of a product's hazards is \$25,000. Tex. Health & Safety Code Ann. § 502.012(f) (Vernon 1990).¹⁸

The lower courts that have considered this issue have recognized the substantial due process concerns associated with unlimited multiple punitive damages awards against a defendant for the same course of conduct.¹⁹ However, these courts have had “the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.” *Roginsky v. Richard-*

¹⁷ *In re Northern Dist. of Cal. “Dalkon Shield” IUD Products Liability Litigation*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *rev’d on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

¹⁸ The Texas statutory scheme is not unique. The most populous state in the country, California, has comparable penalties for the same conduct. See Cal. Labor Code Ann. §§ 6425, 6428 (West 1989).

¹⁹ See, e.g., *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989); *In re School Asbestos Litigation*, 789 F.2d 996, 1004-05 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. at 1060-64; *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 282-83 (D.N.J. 1989); *In re “Agent Orange” Product Liability Litigation*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *mand. denied sub nom.*, *In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 862 (2d Cir. 1984); *In re Northern Dist. of Cal. “Dalkon Shield” IUD Products Liability Litigation*, 526 F. Supp. at 899.

son-Merrell, Inc., 378 F.2d at 839. As a result, no single test to determine excessiveness and no single remedy for any such excessiveness has emerged from the lower court decisions.

There are a number of possible solutions to avoid “overkill” in mass tort cases, however. One possibility would be a “one-bite” rule; that is, the first punitive award imposed against a defendant for a course of conduct would preclude all future claims for punitive damages for the same conduct.²⁰ Another possibility would require the trial judge to reduce the jury’s punitive damages award against a defendant in a particular case by a dollar-for-dollar credit for punitive damages previously awarded against that defendant for the same course of conduct.²¹

²⁰ See, e.g., *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, which allowed a defendant to strike a punitive damages claim upon proof that punitive damages had previously been imposed for the same conduct on the ground that due process barred the imposition of more than one punitive damages award for the same course of conduct. On reconsideration, the court conditioned its ruling upon a showing that the prior punitives award had been made after a complete hearing with an opportunity for similarly situated plaintiffs to be heard and with an instruction to the jury that its award will be the only punitive award for such conduct. 718 F. Supp. 1233, 1235. See also *In re “Agent Orange” Product Liability Litigation*, 100 F.R.D. at 728 (“In theory, . . . when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct.”)

One state has partially imposed this solution by legislation. Georgia has adopted a statute prohibiting multiple recoveries against one defendant in product liability actions filed in that state, but that law has no effect on actions filed outside of the state. See Ga. Code Ann. § 51-12-5.1(e)(1) (Supp. 1989).

²¹ This approach has been codified in Missouri. Missouri provides for a post-trial proceeding in which the defendant may request “the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based.” Mo. Ann. Stat. § 510.263

Other solutions might be possible.²²

The Court need not resolve this question now. We urge the Court, however, to adopt a standard for determining excessiveness in this case that leaves room for consideration of prior punitive damages imposed on a defendant for the same conduct and does not foreclose consideration of whether multiple awards of punitive damages violate due process, so that the lower courts can continue to grapple with this question and this Court can consider it in an appropriate case.²³

(Vernon Supp. 1990). The statute permits the court to offset all prior punitive awards against a defendant for the same conduct regardless of the jurisdiction in which they were imposed.

²² See, e.g., *Wheeler*, *supra* note 8, 40 Ala. L. Rev. at 948. Other suggestions are not likely to solve the problem. For instance, it has been proposed that the trial judge, in reviewing the excessiveness of a particular punitive damages award, should consider evidence of prior punitive awards against the defendant for the same conduct, and reduce or set aside the present award to the extent that it imposes excessive punishment for the same conduct. See *Juzwin*, 705 F. Supp. at 1056 n.1. If the post-verdict review for excessiveness that occurred in this case is any guide, however, such review is not likely to be effective. Several courts have also suggested that all punitive damages claims should be consolidated in a single class action. E.g., *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910, 913 (1982), *rev'd on other grounds*, 98 Ill. 2d 324, 456 N.E.2d 131 (1983); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. at 718 (certification of mandatory punitive damages class action). In the Center's view, such class actions are likely to create more problems than they solve. E.g., *In re School Asbestos Litigation*, 789 F.2d at 1006 (noting difficulties in expanding a class to "confront effectively the punitive damage issue in the entire asbestos area").

²³ See, e.g., *Simpson v. Pittsburgh Corning Corp.*, No. 89-7742 (2d Cir. April 16, 1990) (insufficient record precludes consideration of due process challenge to multiple awards of punitive damages); *Johnson v. Celotex Corp.*, No. 89-7484 (2d Cir. March 20, 1990) ("[I]nsufficient proof to demonstrate an unjust result of multiple imposition of punitive damages for the same course of conduct."); *Rucich v. Celotex Corp.*, 887 F.2d at 398 (substantive due process issue of multiple punitive damages awards not adequately raised nor properly preserved).

CONCLUSION

For the reasons stated in the briefs for Petitioner and supporting *amici*, the judgment of the Alabama Supreme Court should be reversed and the case remanded for further proceedings. For the reasons stated in this brief, any standard for determining whether an award of punitive damages is excessive should allow for consideration of prior awards of punitive damages for the same conduct.

Respectfully submitted,

JOHN D. ALDOCK

(Counsel of Record)

LAURA S. WERTHEIMER

J. THEODORE GENTRY

SHEA & GARDNER

1800 Massachusetts Ave., N.W.

Washington, D.C. 20036

(202) 828-2000

Attorneys for Amicus Curiae

Center for Claims Resolution

Of Counsel:

PETER C. COLEMAN

EDMUND K. JOHN

CENTER FOR CLAIMS RESOLUTION

116-300 Village Boulevard

Princeton, New Jersey 08540

(609) 520-6800

June 1, 1990

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
 v.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN
 and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the
 Supreme Court of Alabama

BRIEF OF AMICI CURIAE
CBS INC., CAPITAL CITIES/ABC, INC.,
DOW JONES & COMPANY, INC., THE HEARST
CORPORATION, KNIGHT-RIDDER, INC., NATIONAL
BROADCASTING COMPANY, INC., REUTERS
INFORMATION SERVICES INC., THE TIME INC.
MAGAZINE COMPANY, TRIBUNE COMPANY,
UNITED PRESS INTERNATIONAL, INC.,
THE WASHINGTON POST, WESTINGHOUSE
BROADCASTING COMPANY, INC., THE AMERICAN
SOCIETY OF NEWSPAPER EDITORS, ASSOCIATION
OF AMERICAN PUBLISHERS, MAGAZINE
PUBLISHERS OF AMERICA, INC., NATIONAL
ASSOCIATION OF BROADCASTERS,
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION,
REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS,
AND THE SOCIETY OF PROFESSIONAL JOURNALISTS,
IN SUPPORT OF PETITIONERS

Of Counsel:

DOUGLAS P. JACOBS
 CBS Inc.
 51 West 52nd Street
 New York, New York 10019
Attorney for CBS Inc.

(Additional Of Counsel
 listed inside cover)

P. CAMERON DEVORE *
 MARSHALL J. NELSON
 DONALD S. KUNZE
 DAVIS WRIGHT TREMAINE
 2600 Century Square
 1501 Fourth Avenue
 Seattle, WA 98101-1688
 (206) 622-3150

Counsel for Amici Curiae

* Counsel of Record

STEVEN SADICARIO
Capital Cities/ABC, Inc.
47 West 66th Street
New York, New York 10023
*Attorney for Capital Cities/
ABC, Inc.*

RICHARD J. TOFEL
Dow Jones & Company, Inc.
200 Liberty Street
New York, New York 10281
*Attorney for
Dow Jones & Company, Inc.*

VICTOR F. GANZI
ROBERT J. HAWLEY
The Hearst Corporation
959 Eighth Avenue
New York, New York 10019
*Attorneys for
The Hearst Corporation*

JOHN C. FONTAINE
Knight-Ridder, Inc.
One Herald Plaza
Miami, Florida 33132
*Attorney for
Knight-Ridder, Inc.*

SANDRA S. BARON
National Broadcasting
Company, Inc.
30 Rockefeller Plaza
New York, New York 10112
*Attorney for National
Broadcasting Company, Inc.*

CONSTANCE A. HEYMANN
Reuters Information
Services Inc.
1700 Broadway
New York, New York 10019
*Attorney for Reuters
Information Services Inc.*

HARRY M. JOHNSTON III
The Time Inc. Magazine
Company
1271 Avenue of the Americas
New York, New York 10020
*Attorney for The Time Inc.
Magazine Company*

DAVID D. HILLER
Tribune Company
435 N. Michigan
Chicago, Illinois 60611
Attorney for Tribune Company

JAMES L. ARNOLD
United Press International, Inc.
9990 Lehigh Way, Third Floor
Fairfax, Virginia 22030
*Attorney for United Press
International, Inc.*

BARBARA PERCIVAL
The Washington Post
1150 - 15th Street, N.W.
Washington, D.C. 20071
*Attorney for
The Washington Post*

MARTIN P. MESSINGER
MARK H. CHARLES
Westinghouse Broadcasting
Company, Inc.
888 Seventh Avenue, 39th Floor
New York, New York 10106
*Attorneys for Westinghouse
Broadcasting Company, Inc.*

RICHARD M. SCHMIDT, JR.
COHN & MARKS
1333 New Hampshire Ave.
Suite 600
Washington, D.C. 20036
*Attorney for
American Society of
Newspaper Editors*

R. BRUCE RICH
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
*Attorney for
Association of
American Publishers*

TINA A. RAVITZ
Vice President and Chief Counsel
Newsweek, Inc.
444 Madison Avenue
New York, New York 10022
*Attorney for Magazine
Publishers of America, Inc.*

HENRY L. BAUMANN
STEVEN A. BOOKSHESTER
National Association
of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
*Attorneys for National
Association of Broadcasters*

JANE E. KIRTLEY
Executive Director
Reporters Committee for
Freedom of the Press
Suite 504
1735 Eye St., N.W.
Washington, D.C. 20006
*Attorney for Reporters
Committee for Freedom
of the Press*

BRUCE W. SANFORD
BAKER & HOSTETLER
1050 Connecticut Ave., N.W.
Washington, D.C. 10006
*Attorney for The Society
of Professional Journalists*

J. LAURENT SCHARFF
REED SMITH SHAW & McCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
*Attorney for Radio-Television
News Directors Association*

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE EXPERIENCE OF MEDIA DEFEND- ANTS IN LIBEL CASES HIGHLIGHTS THE DANGERS OF UNRESTRAINED PUNITIVE DAMAGE AWARDS	3
A. Punitive Damage Awards in Libel Cases Have Increased Despite Constitutional Limits Imposed by the Court	3
B. Punitive Damages Have Been Arbitrarily Assessed Against Unpopular Defendants	8
C. The "Prize" of Unrestrained Punitive Dam- age Awards Has Encouraged Expensive and Unnecessary Litigation	11
II. PUNITIVE DAMAGES ARE UNNECESSARY AND INEFFECTIVE IN SERVING THEIR THEORETICAL PURPOSES	12
III. THE AWARD OF PUNITIVE DAMAGES AND THE METHOD BY WHICH THEY ARE IM- POSED VIOLATES DUE PROCESS RE- QUIRED UNDER BOTH THE FIRST AND FOURTEENTH AMENDMENTS	17
A. The First Amendment Requires the Highest Due Process Where Punishment or Suppres- sion of Speech Is Threatened	17
B. The Award of Punitive Damages Fails to Satisfy Even Minimum Standards of Due Process	18
C. The Award of Punitive Damages in Libel Cases Fails to Satisfy Heightened Due Process Standards Required by the First Amendment	22

TABLE OF CONTENTS—Continued

	Page
D. Standardless and Deferential Appellate Review of Punitive Damage Awards Cannot Satisfy Constitutional Requirements	24
CONCLUSION	26
APPENDIX A: Identity of Individual Amici	1a

TABLE OF AUTHORITIES

CASES:	Page
<i>Aetna Life Insurance Co. v. Lavoie</i> , 475 U.S. 813 (1986)	3
<i>Bankers Life and Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988)	3, 20
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963)	4, 18
<i>Bose Corp. v. Consumers Union of United States, Inc.</i> , 466 U.S. 485 (1984)	19, 24, 25
<i>Braun v. Flynt</i> , 726 F.2d 245 (5th Cir.), cert. denied, 469 U.S. 883 (1984)	24
<i>Brown & Williamson Tobacco Corp. v. Jacobson</i> , 713 F.2d 262 (7th Cir. 1983)	22
<i>Brown & Williamson Tobacco Corp. v. Jacobson</i> , 827 F.2d 1119 (7th Cir. 1987), cert. denied, 485 U.S. 993 (1988)	9, 24
<i>Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989)	3, 19, 20
<i>Buckley v. Littell</i> , 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977)	6, 22
<i>Curtis Publishing Co. v. Butts</i> , 388 U.S. 130 (1967)	4
<i>Davis v. Schuchat</i> , 510 F.2d 731 (D.C. Cir. 1975) ..	22
<i>Douglass v. Hustler Magazine, Inc.</i> , 769 F.2d 1128 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986)	24
<i>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985)	passim
<i>Electrical Workers v. Foust</i> , 442 U.S. 42 (1979) ..	12
<i>Fay v. Parker</i> , 53 N.H. 342 (1872)	16
<i>The Florida Star v. B.J.F.</i> , 109 S. Ct. 2603 (1989) ..	21
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	19, 24
<i>George v. International Society for Krishna Consciousness</i> , 262 Cal. Rptr. 217 (Cal. App. 1989) ..	7-8
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974) ..	passim
<i>Gitlow v. New York</i> , 268 U.S. 652 (1925)	17
<i>Guccione v. Hustler Magazine</i> , 800 F.2d 298 (2d Cir. 1986), cert. denied, 479 U.S. 1091 (1987)	8
<i>Harte Hanks Communications, Inc. v. Connaughton</i> , 109 S. Ct. 2678 (1989)	15, 19, 22, 24

TABLE OF AUTHORITIES—Continued

	Page
<i>Killibrew v. Abbot Laboratories</i> , 359 So.2d 1275 (La. 1978)	16
<i>Kingsley Books, Inc. v. Brown</i> , 354 U.S. 436 (1953)	18
<i>Lerman v. Flynt Distributing Co.</i> , 745 F.2d 123 (2d Cir. 1984), cert. denied, 471 U.S. 1045 (1985)	8
<i>Lovell v. Griffin</i> , 303 U.S. 444 (1938)	18
<i>Maheu v. Hughes Tool Co.</i> , 569 F.2d 459 (9th Cir. 1977)	22
<i>Maki v. Aluminum Bldg. Products</i> , 73 Wash.2d 23, 436 P.2d 186 (1968)	16
<i>McCoy v. Hearst Corp.</i> , 174 Cal. App. 3d 892, 220 Cal. Rptr. 848 (1985)	9
<i>Miller v. Kingsley</i> , 194 Neb. 123, 230 N.W.2d 472 (1972)	16
<i>Monitor Patriot Co. v. Roy</i> , 401 U.S. 265 (1971)	24
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	19
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931)	17, 18, 23
<i>Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	12
<i>Newton v. National Broadcasting Co.</i> , 677 F. Supp. 1066 (1987)	8
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	passim
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971)	18
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971)	18
<i>Pacific Mutual Life Ins. Co. v. Haslip</i> , 553 So.2d 537 (Ala. 1989)	10
<i>Philadelphia Newspapers, Inc. v. Hepps</i> , 475 U.S. 767 (1986)	18
<i>Police Department v. Mosley</i> , 408 U.S. 92 (1972) ..	19
<i>Pring v. Penthouse International</i> , 695 F.2d 438 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983)	8
<i>Rosenbloom v. Metromedia, Inc.</i> , 403 U.S. 29 (1971)	4, 5

TABLE OF AUTHORITIES—Continued

	Page
<i>Shuttlesworth v. Birmingham</i> , 394 U.S. 147 (1969)	19
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	4, 11, 16, 21
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975)	19
<i>Speiser v. Randall</i> , 357 U.S. 513 (1957)	18
<i>Sprague v. The Philadelphia Inquirer</i> , New York Times, May 31, 1990 at 1, col. 2 (Pa. Ct. Com. Pl., May 3, 1990)	7
<i>Sprouse v. Clay Communication, Inc.</i> , 158 W. Va. 427, 211 S.E.2d 674, cert. denied, 423 U.S. 991 (1975)	7
<i>Srivastava v. Harte Hanks Communications, Inc.</i> , Communications Daily, May 7, 1990 (Tex. Ct. Com. Pl., formal judgment pending)	7
<i>Stone v. Essex County Newspapers, Inc.</i> , 367 Mass. 849, 330 N.E.2d 161 (1975)	6, 7
<i>Taskett v. King Broadcasting Co.</i> , 86 Wash.2d 439, 546 P.2d 81 (1976)	7
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938)	18
<i>Vratsenes v. New Hampshire Auto, Inc.</i> , 112 N.H. 71, 289 A.2d 66 (1972)	16
<i>Wheeler v. Green</i> , 286 Or. 99, 593 P.2d 777 (1979) ..	6
<i>Young v. American Mini Theaters</i> , 427 U.S. 50 (1976)	18

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. I	passim
U.S. Const. amend. IV	4
U.S. Const. amend. V	4
U.S. Const. amend. VI	4
U.S. Const. amend. VIII	3
U.S. Const. amend. XIV	passim

OTHER AUTHORITIES:

Curley, " 'Chilling Effect' How Libel Suit Sapped the Crusading Spirit of a Small Newspaper," Wall St. J., Sept. 29, 1983 at 1, col. 1	7
--	---

TABLE OF AUTHORITIES—Continued

	Page
Franklin, <i>Suing Media for Libel; A Litigation Study</i> , 1981 A.B.A. Res. J. 795	6
Goodale, <i>Centuries of Libel Erased by Times v. Sullivan</i> , 191 N.Y.L.J. 49 (1984)	9
Jeffries, <i>A Comment on the Constitutionality of Punitive Damages</i> , 72 Va. L. Rev. 139 (1986)	4
Libel Defense Resource Center Bulletin No. 21 (October 31, 1987)	6
Libel Defense Resource Center, <i>Recent Trends in Libel Damage Awards Against the Media</i> , Libel Defense Resource Center Bulletin No. 18 (December 15, 1986)	6
Libel Defense Resource Center Bulletin No. 11 (November 14, 1984)	6
Massing, <i>The Libel Chill: How Cold Is It Out There?</i> , Colum. Journalism Rev. at 31 (May/June, 1985)	7
Note, <i>The Constitutionality of Punitive Damages in Libel Actions</i> , 45 Fordham L. Rev. 1382 (1977)	7
Note, <i>Punitive Damages and Libel Law</i> , 98 Harv. L. Rev. 859 (1985)	8, 13, 15
Report, Committee on Communications Law, <i>Punitive Damages in Libel Actions</i> , 42 Record of Assoc. of Bar of City of New York 20 (Jan./Feb. 1987)	6
Restatement (Second) of Torts § 908(2) (1977)	15
Sack & Tofel, <i>First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages</i> , 90 Dick. L. Rev. 609 (1986)	9, 15
Van Alstyne, <i>First Amendment Limitations on Recovery from the Press</i> , 25 Wm. & Mary L. Rev. 793 (1984)	9, 10
Wheeler, <i>The Constitutional Case for Reforming Punitive Damages Procedures</i> , 69 Va. L. Rev. 269 (1983)	passim

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

 No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
 v.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN
 and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the
 Supreme Court of Alabama

BRIEF OF AMICI CURIAE
 CBS INC., CAPITAL CITIES/ABC, INC.,
 DOW JONES & COMPANY, INC., THE HEARST
 CORPORATION, KNIGHT-RIDDER, INC., NATIONAL
 BROADCASTING COMPANY, INC., REUTERS
 INFORMATION SERVICES INC., THE TIME INC.
 MAGAZINE COMPANY, TRIBUNE COMPANY,
 UNITED PRESS INTERNATIONAL, INC.,
 THE WASHINGTON POST, WESTINGHOUSE
 BROADCASTING COMPANY, INC., THE AMERICAN
 SOCIETY OF NEWSPAPER EDITORS, ASSOCIATION
 OF AMERICAN PUBLISHERS, MAGAZINE
 PUBLISHERS OF AMERICA, INC., NATIONAL
 ASSOCIATION OF BROADCASTERS,
 RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION,
 REPORTERS COMMITTEE FOR FREEDOM
 OF THE PRESS,
 AND THE SOCIETY OF PROFESSIONAL JOURNALISTS,
 IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

This brief is submitted on behalf of nineteen amici curiae who include broadcasters, news services, publishers, and associations of working journalists and writers.* As members of the media, these amici operate under the constant threat of libel claims, almost all of which seek punitive damages. In recent years, both the frequency and amount of these awards have increased at an alarming rate.

The threat of punitive damage awards now affects the nation's media at all levels, from national news organizations to the smallest local newspapers and broadcasters, and interferes with their vital role in the reporting and discussion of public affairs. At a minimum, therefore, these amici support the due process limitations urged by the petitioner in this case.

However, these amici also believe that punitive damages awards in libel cases involving matters of public concern are irreconcilable with the requirements of the First Amendment. They therefore urge the Court to recognize that its decision in the present case may also have an impact in cases arising from discussion of public affairs, where mere limitations on punitive damage awards may not be adequate to protect First Amendment values.

SUMMARY OF ARGUMENT

The libel decisions of this Court have examined the problem of unrestrained punitive damage awards at length, and the Court has imposed constitutional limitations on the award of such damages arising from speech involving matters of public concern. These restraints, although framed under the First Amendment, are essentially due process concerns, and their reasoning has been applied by the Court in non-libel cases as well. They

* Written consent of both parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 36.

serve as a valuable touchstone for addressing constitutional limitations on punitive damages in general.

In any kind of case, the availability of unrestrained punitive damages encourages unnecessary litigation, permits arbitrary punishment of unpopular defendants, and often deters conduct that is lawful, socially beneficial, and even constitutionally protected. When balanced against the ineffectiveness of such awards in serving even their own theoretical purposes, the harm caused by the threat of punitive damages far outweighs any arguable benefit.

Such an arbitrary system of punishment offends fundamental principles of due process. When it is employed by juries to punish unpopular speech and speakers, it violates the First Amendment as well. The First Amendment requires that any form of government action that threatens to punish or suppress speech must meet the highest standards of due process. The unrestrained award of punitive damages fails to satisfy even the minimum standards required by the Fourteenth Amendment and is inherently inconsistent with the requirements of the First Amendment.

ARGUMENT

I. THE EXPERIENCE OF MEDIA DEFENDANTS IN LIBEL CASES HIGHLIGHTS THE DANGERS OF UNRESTRAINED PUNITIVE DAMAGE AWARDS.

A. Punitive Damage Awards in Libel Cases Have Increased Despite Constitutional Limits Imposed by the Court.

Well before the recent challenges to punitive damages on Eighth and Fourteenth Amendment grounds,¹ this Court recognized the danger posed by punitive damages under the First Amendment. In fact, the problem of unrestrained damage awards has been a constant theme in

¹ See *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Actua Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

this Court's efforts to reconcile the common law of libel with competing First Amendment limitations.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964), the Court recognized that the threat of unrestrained punitive damages raises severe constitutional problems as "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance on the criminal law." (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).²

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and again in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the discussion of punitive damage awards occupied much of the Court's attention. Justice Harlan, originally supporting punitive damages in *Butts*, expressly retreated from that position in *Rosenbloom* and concluded:

I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.

² The Court observed:

A person charged with violation of this [criminal libel] statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded . . . for the same publications.

376 U.S. at 277; see also *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("although punitive damages are 'quasi-criminal,' . . . their imposition is unaccompanied by the types of safeguards present in criminal proceedings"); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 152-53 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 322-33 (1983) (suggesting application of Fourth, Fifth and Sixth Amendments to punitive damages proceedings).

403 U.S. at 77 (Harlan, J., dissenting). In a separate opinion, Justices Marshall and Stewart concluded that punitive damages should be prohibited altogether in such cases.³ These dissenting opinions became the foundation for the majority opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where the Court concluded:

[P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries

Id. at 350.⁴

Most recently, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), four members of the Court joined in an opinion reasserting the objections to punitive awards discussed in *Rosenbloom* and *Gertz*, stressing the "largely uncontrolled discretion" of juries to assess damages "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused" as a rationale for the limitations imposed in *Gertz*. *Id.*

³ 403 U.S. at 82-83 (Marshall, J., dissenting):

[Punitive damages] serve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, however, punitive damages are not awarded within discernible limits but can be awarded in almost any amount. Since there is not even an attempt to offset any palpable loss and since these damages are the direct product of the ancient theory of unlimited jury discretion, the only limit placed on the jury in awarding punitive damages is that the damages not be "excessive," and in some jurisdictions that they bear some relationship to the amount of compensatory damages awarded. [Citation omitted.] The manner in which unlimited discretion may be exercised is plainly unpredictable.

⁴ See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 779 (1985) (Brennan, J., dissenting) ("Justice Harlan's perception formed the cornerstone of the Court's analysis in *Gertz*").

at 778 (Brennan, J., dissenting) (quoting *Gertz*, 418 U.S. at 350).

Each of these cases, including *Dun & Bradstreet*, affirmed the need for constitutional limits on the availability of libel damages to protect discussion of public affairs, with the Court in *Gertz* holding simply:

[T]hat the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

418 U.S. at 349.

Despite these stated concerns and limitations, both the amount and frequency of punitive damage awards against the media in libel cases have continued to rise. During the 1980's multi-million dollar verdicts against libel defendants became almost commonplace.⁵ Many awards were overturned or reduced on appeal; many were questioned on constitutional grounds by courts and commentators alike;⁶ but these facts are cold comfort to the pub-

⁵ One study reported that, between 1980 and 1984, approximately 60% of libel verdicts against media defendants included an award of punitive damages (compared to less than 10% for non-libel cases involving money damages). The average punitive award was reported as substantially in excess of \$2,500,000, and punitive damages accounted for approximately 80% of the total amount of damages awarded. See Libel Defense Resource Center, *Recent Trends in Libel Damage Awards Against the Media*, Libel Defense Resource Center Bulletin No. 18 at 58-63 (December 15, 1986). See also, Libel Defense Resource Center Bulletin No. 21 (October 31, 1989); Libel Defense Resource Center Bulletin No. 11 (November 14, 1984); Franklin, *Suing Media for Libel: A Litigation Study*, 1981 A.B.A. Res. J. 795, 829; Report, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 Recrd of Assoc. of Bar of City of New York 20, 39-40 (Jan./Feb. 1987).

⁶ See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 793-94 (1985) (Brennan, J. dissenting); see also *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979); *Stone*

lishers and broadcasters who may be forced to meet prohibitive bond requirements and to endure expensive appeals before constitutional safeguards are properly applied.⁷

The trend toward ever-higher and increasingly irrational punitive awards continues. In *Sprague v. The Philadelphia Inquirer*, New York Times, May 3, 1990 at 1, col. 2 (Pa. Ct. Com. Pl., May 3, 1990), a jury awarded \$31.5 million in punitive damages against the Philadelphia Inquirer in a libel action. This was the second time the case was sent to a jury. On the first occasion, a different jury imposed a punitive award of "only" \$4 million (a difference of \$27.5 million) on the same set of facts. The challenged articles concerned the plaintiff's investigation of a homicide in his capacity as chief of homicide for the Philadelphia District Attorney's office. Similarly, in *Srivastava v. Harte Hanks Communications, Inc.*, Communications Daily, May 7, 1990 (Tex. Ct. Com. Pl., formal judgment pending), a jury awarded the plaintiff \$17.5 million in punitive damages in a libel action against a local television station. In *George v. International Society for Krishna Conscious-*

v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975); *Taskett v. King Broadcasting Co.*, 86 Wash.2d 439, 546 P.2d 81 (1976); *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 211 S.E.2d 674, *cert. denied*, 423 U.S. 991 (1975); see also *Wheeler*, *supra* note 2; Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847 (1985).

⁷ This fact was shown dramatically in the case of the *Alton Telegraph*, a small Illinois newspaper, which suffered a \$9.2 million libel verdict, including \$2.5 million punitive damages. The company, valued at only \$3 million ultimately settled for \$1.4 million after it was unable to raise the bond required for an appeal on the merits. See Curley, "Chilling Effect' How Libel Suit Sapped the Crusading Spirit of a Small Newspaper," Wall St. J., Sept. 29, 1983, at 1, col. 1. See also, Massing, *The Libel Chill: How Cold Is It Out There?*, Colum. Journalism Rev., at 31 (May/June, 1985); Note, *The Constitutionality of Punitive Damages in Libel Actions*, 45 Fordham L. Rev. 1382, 1384 (1977).

ness, 262 Cal. Rptr. 217 (Cal. App. 1989), a jury awarded \$32 million in punitive damages for, among other things, a libel claim based on a press release. In *Newton v. National Broadcasting Co.*, 677 F. Supp. 1066 (D. Nev. 1987), currently on appeal before the Ninth Circuit, a Las Vegas jury awarded \$5 million in punitive damages against NBC in a libel action brought by entertainer Wayne Newton. It appears that juries are feeling no particular restraints, constitutional or otherwise, in awarding punitive damages in libel cases.

B. Punitive Damages Have Been Arbitrarily Assessed Against Unpopular Defendants.

In theory, punitive damages are intended to punish and to deter specific conduct that society finds outrageous or reprehensible.⁸ In practice, however, juries often use this uncontrolled weapon to punish defendants not for what they have done, but for who they are. It is no mere coincidence that defendants such as *Hustler* and *Penthouse* magazines have suffered punitive damage verdicts in the eight-figure range more than once.⁹

Far more troubling is the number of these megaverdicts that are being imposed in cases arising out of commentary on public affairs¹⁰ and the six- and seven-figure punitive awards imposed on news media defendants almost as a matter of course, once the jury finds for the

⁸ See Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 849 (1985); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 282 (1983).

⁹ See, e.g., *Guccione v. Hustler Magazine*, 800 F.2d 298 (2d Cir. 1986), cert. denied, 479 U.S. 1091 (1987) (\$37,000,000); *Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (2d Cir. 1984), cert. denied, 471 U.S. 1015 (1985) (\$33,000,000); *Pring v. Penthouse International*, 695 F.2d 438 (10th Cir. 1982); cert. denied, 462 U.S. 1132 (1983) (\$25,000,000).

¹⁰ See notes 5-7 and accompanying text, *supra*.

plaintiff on the question of liability.¹¹ Professor Van Alstyne, commenting on this disturbing pattern, observed: "[J]uries may tend to find whatever they are told is necessary for them to find if they thoroughly dislike the publisher, his publication, his general practice, or his business" Van Alstyne, *First Amendment Limitations on Recovery from the Press*, 25 Wm. & Mary L. Rev. 793, 795-96 (1984).¹²

It may be that libel juries are merely reflecting a general shift of attitude on the subject of damages—that "[j]uries in all forms of tort litigation are finding for individual plaintiffs with less attention to the arguments of corporate defendants and greater inclination to award staggering damages than ever before." Goodale, *Centuries of Libel Erased by Times v. Sullivan*, 191 N.Y.L.J. 49 (1984). The jury in the present case may have awarded punitive damages out of sympathy for the plaintiff—a sense that "someone should pay" for what she endured, regardless of the culpability of the particular defendant. This sense of frustration and anger may be a natural human reaction, but it is not a rational basis for assessing punitive damages, and unchecked, it leads to arbitrary and irrational results.¹³

¹¹ See, e.g., *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), cert. denied, 485 U.S. 993 (1988).

¹² Professor Van Alstyne also noted the possibility that attempts to restrict awards under the actual malice rule may have had the opposite impact on jurors:

[A] juror might suppose that if recklessness must be proved and if recklessness also entitles the defendant to consideration of punitive damages, then absent some exceptional reasons, the juror ought assuredly and quite routinely award punitive damages

Van Alstyne, 25 Wm. & Mary L. Rev. at 797.

¹³ See Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dick. L. Rev. 609, 613-15 (1989) (discussing jury verdict in *McCoy v. Hearst Corp.*, 174 Cal. App. 3d 892, 220 Cal. Rptr. 848 (1985), which awarded iden-

When the defendant's conduct toward the plaintiff does become an issue, the jury is almost always invited to "send a message" that the defendant—often a large corporation—cannot ignore. Unfortunately, there is very little guidance at that point to insure that the message is warranted by the defendant's conduct, and not merely by the jurors' distaste for the defendant's size, financial net worth, or even by regional prejudices.

As Justice Douglas reminded in his dissent in *Gertz*, the influence of emotion and prejudice is not confined to juries: "Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are subject to those emotions." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 359 (1974). Excessive damage awards may also reflect, in part, "localized judicial distaste for certain publishers" and judges' "understandable, but constitutionally improper, distaste for the defendant's publication." Van Alstyne, 25 Wm. & Mary L. Rev. at 801, 808.

In short, the danger of punitive damages is not merely that they are unrestrained; it is that they are, by definition, a court-sanctioned invitation to *punish* the defendant. And as long as punitive damages remain available as a weapon in civil cases, there will be the temptation to punish for the wrong reasons. Restraining the *amount* of damages or the procedures under which they are awarded will not remove the temptation. Jurors and judges alike may simply find whatever they are told they need to find to justify the result, if the desire to award damages is great enough.

tical amounts of \$1,000,000 "compensatory" and \$520,000 punitive damages to each of three different plaintiffs and apportioned the awards with similar symmetry against a newspaper, its reporter, and a freelance writer). See also notes 5-7 and accompanying text, *supra*. In the present case, on the other hand, one respondent appears to have received the entire punitive award, while the other three were restricted to compensatory damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537, 539 (Ala. 1989).

C. The "Prize" of Unrestrained Punitive Damage Awards Has Encouraged Expensive and Unnecessary Litigation.

The prospect of virtually unlimited punitive damage awards against large corporations can and does change the character of litigation. The punitive damage lawsuit is not controlled by practical concerns of fair compensation for real loss suffered or a realistic assessment of its costs. Too often, it becomes an expensive, time-consuming, and wasteful exercise in litigation tactics—a high-stakes gamble on the jury's emotions, with a prize limited only by the defendant's net worth. And because the stakes are perceived to be so high, the defense of a punitive damages case may also take on the inflated character of a multi-million dollar dispute, whether justified or not.

This lottery mentality, especially prevalent in libel cases, can lead to protracted and expensive litigation in virtually any kind of case where the defendant's attitude, size, or wealth can be made an issue. And, as the experience with libel cases demonstrates, the promise of unrestrained awards can subvert even the most carefully-drawn system for compensating actual injury and convert it to an emotional appeal to jury passion and prejudice. The end result is an irrational system in which the costs—"the encouragement of unnecessary litigation and the chilling of desirable conduct"—far outweigh the alleged benefits of punitive damages. *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

In the area of libel law, the "desirable conduct" chilled by the prospect of punitive damages is constitutionally protected conduct—free speech on matters of public concern. The need to protect this First Amendment interest has been the driving force behind restrictions imposed by this Court in libel cases, but the Court's attention has been focused on restricting liability, not dam-

ages.¹⁴ Although the Court's reasoning in these cases has addressed the chilling effect of unrestricted and unpredictable damage awards on First Amendment freedoms,¹⁵ and although these arguments have been applied to restrict punitive damages in non-libel cases,¹⁶ the Court has not yet imposed these restrictions directly on the award of libel damages. The result is a standing invitation for libel plaintiffs to navigate whatever rules and semantic hurdles may be necessary to gain the prize of unlimited punitive damages. The recent examples discussed above¹⁷ suggest that plaintiffs and their lawyers are accepting this invitation with disturbing frequency and substantial monetary success.

II. PUNITIVE DAMAGES ARE UNNECESSARY AND INEFFECTIVE IN SERVING THEIR THEORETICAL PURPOSES.

The traditional common-law justifications offered for punitive damages are: (1) providing compensation in cases where undercompensation of harm is likely, (2)

¹⁴ Even in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974), which purported to restrict libel damages to "compensation for actual injury," the possibility of punitive damages where actual malice could be shown was only noted in passing. There was no discussion of what further limitations might be constitutionally required in such a case. More recently, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. at 771 (White, J., concurring), Justice White criticized the Court's single-minded focus on the liability issue and suggested instead that presumed and punitive damages might have been restricted or prohibited altogether, as an alternative means of First Amendment protection.

¹⁵ See, notes 2-4 and accompanying text, *supra*.

¹⁶ See, e.g., *Electrical Workers v. Foust*, 442 U.S. 42, 48-52 (1979) (union's breach of duty of fair representation); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (municipal liability under § 1983). See also, *Dun & Bradstreet*, 472 U.S. at 780 n.4 (Brennan, J., dissenting).

¹⁷ See notes 5-7 and accompanying text, *supra*.

deterrence of future undesirable conduct, and (3) punishment or retribution for past reprehensible conduct. See Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 850 (1985); see also *Gertz*, 418 U.S. at 849-50; *Dun & Bradstreet*, 472 U.S. at 760-61.

In the context of libel awards, the Court has recognized that, with the possible exception of purely private libel cases,¹⁸ punitive damages do not serve "[t]he legitimate state interest underlying the law of libel [,-i.e.,] the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz*, 418 U.S. at 341. Punitive damages "are wholly unrelated to th[is] state interest" because they "are not compensation for injury." *Id.* at 350.¹⁹

Even in non-speech cases, it is highly doubtful whether punitive damages serve their own declared purposes. The "undercompensation" rationale is a logical outgrowth of early common law limitations on actual damages. See *Wheeler*, *supra* note 2 at 304-05. Modern damages theories are far more expansive—courts no longer rely on restrictive definitions of "actual damages." Under relaxed standards of proof, they now allow compensation for virtually every conceivable form of injury. See *Gertz*, 418 U.S. at 350 ("actual injury is not limited to out-of-pocket loss" and "include[s] impairment of reputation and standing in the community, personal humiliation,

¹⁸ In *Dun & Bradstreet*, 472 U.S. 749, the Court upheld an award of punitive damages in what the plurality opinion characterized as a "purely private" libel case involving no matters of public interest. However, one of the three Justices making up the plurality was Justice O'Connor, who has since declared her strong concern that the award of uncontrolled punitive damages may be unconstitutional. See text accompanying notes 30-31, *infra*.

¹⁹ The related doctrine of presumed damages is also essentially punitive, inviting juries "to punish unpopular opinion rather than to compensate" and to grant "gratuitous awards of money damages far in excess of any actual injury," a result in which "the States have no substantial interest." *Id.* at 349.

and mental anguish and suffering"); *see also* Wheeler, *supra* note 2 at 305, 310. Given this expansive reading of actual damages in libel cases, the compensatory justification for punitive damages in such cases is no longer valid.

It is equally doubtful whether punitive damages are effective as a deterrent to future wrongful conduct:

The theory of deterrence assumes that the person to be deterred rationally weighs the benefits and costs (including the possible punitive sanctions discounted by the probability of their being imposed) likely to flow from the contemplated conduct.

Id. at 306. This theoretical balancing process depends on the potential defendant's ability to accurately predict the amount and the likelihood of those costs; deterrence is effective only when costs are both certain to be imposed and optimal in amount, that is, sufficient to deter the targeted conduct without also deterring beneficial conduct. *Id.* at 306-09.

In practice, however, the imposition of punitive damages falls totally outside this theoretical framework. In a statutory scheme, legislatures at least have the opportunity to consider such questions and to attempt definitions of both conduct and punishment that will approximate these goals. In the courtroom, however, juries are invited to assess punitive damages without any consideration of, much less confinement to, the amount strictly necessary to deter *only* unprotected conduct. There is no certainty as to whether such damages will be imposed or in what amounts. This unpredictability alone undercuts the theoretical goal of deterrence.²⁰

²⁰ It might be argued that strict application of the standards defining such intentional torts as fraud reduces the unpredictability of punitive damage awards, but the media's experience with the carefully defined "actual malice" standard refutes this assumption. Actual malice may make liability more difficult to establish, but "courts still lack a way of judging in First Amendment terms the

Finally, especially in the libel context, punitive damages do not effectively serve the purpose of punishment or retribution. "The state has a legitimate interest in retribution only when the wrongdoer has chosen to commit a morally reprehensible act, knowing that it would likely cause harm to another individual." Note, 98 Harv. L. Rev. at 859; *see also* Wheeler, *supra* note 2 at 311. In most libel cases, punitive damages are awarded without regard to these considerations, despite use of the term actual "malice."

Even when the actual malice rule is properly applied, it does not necessarily reach the issue of whether the defendant's conduct is truly "outrageous" and prompted by the "evil motives" normally required to be shown before punitive damages may be awarded.²¹ The requirement of actual malice in libel cases is a tool for defining the standard of *liability*, not the level of damages. It focuses only on the defendant's attitude toward the facts, and not on the defendant's attitude toward the plaintiff or any intent to do harm. *See, e.g., Harte Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2684-85 (1989); Note, 98 Harv. L. Rev. at 854. It is possible, therefore, to have a technical finding of "actual malice" as defined by *New York Times* where there is absolutely no evidence of "malicious" conduct in the common sense of the word. The jury may then be invited to award punitive damages without any further restrictions.

propriety of the amount of an award, however stupendous, once the liability hurdle has been surmounted." Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dick. L. Rev. 609, 616 (1986) (footnote omitted). Once a jury finds actual malice, its discretion to award punitive damages may remain virtually unbridled. Potential defendants still may or may not face heavy damage awards depending on how the jury reacts to their choice of language.

²¹ *See* Restatement (Second) Of Torts § 908(2) (1977) (imposition of punitive damages is premised on outrageous conduct arising out of the defendant's evil motives).

In summary, awards of punitive damages against speech on matters of public concern do not "further the state interest in providing remedies for defamation by ensuring that those remedies are effective." *Dun & Bradstreet*, 472 U.S. at 761. They do not effectively deter, punish, or compensate for injury from unprotected speech. Instead, these damages overcompensate plaintiffs (often dramatically) at the constitutionally impermissible expense of deterring and punishing *protected* speech.

These costs associated with punitive damages arise outside the First Amendment context as well. *See, e.g., Smith v. Wade*, 461 U.S. at 59-60 (Rehnquist, J., dissenting) ("The alleged deterrence achieved by punitive damages is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct . . ."). As a result, the highest courts of several states have rejected punitive damages as fundamentally unsound in principle.²²

²² *See Killibrew v. Abbott Laboratories*, 359 So.2d 1275 (La. 1978) ("punitive damages are not allowable unless . . . a statute expressly authorizes the imposition of such a penalty"); *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1972) ("It is a fundamental rule of law in this state that punitive, vindictive or exemplary damages are not allowed. The measure of recovery in all civil cases is compensation for injury sustained."); *Vratsenes v. New Hampshire Auto, Inc.*, 112 N.H. 71, 289 A.2d 66 (1972) ("The idea [of punitive damages] is wrong. It is a monstrous heresy." quoting *Fay v. Parker*, 53 N.H. 342, 382 (1872)); *Maki v. Aluminum Bldg. Products*, 73 Wash.2d 23, 436 P.2d 186 (1968) ("From [1871] to the present day, this court has held that the doctrine of punitive damages is unsound in principle.").

III. THE AWARD OF PUNITIVE DAMAGES AND THE METHOD BY WHICH THEY ARE IMPOSED VIOLATES DUE PROCESS REQUIRED UNDER BOTH THE FIRST AND FOURTEENTH AMENDMENTS.

A. The First Amendment Requires the Highest Standards of Due Process Where Punishment or Suppression of Speech Is Threatened.

While the basic issue before the Court is whether unrestrained punitive damage awards violate due process requirements of the Fourteenth Amendment, much of the Court's discussion of punitive damages to date has centered on limitations mandated by the First Amendment. This fact may tempt some to dismiss the relevance of these earlier decisions by categorizing them narrowly as "free speech" cases, but on closer review it is clear that the reasoning of these cases can be asserted with equal conviction under the Due Process Clause of the Fourteenth Amendment. In fact, in summarizing the constitutional objections to punitive damages in the libel context, the dissent in *Dun & Bradstreet* was framed largely in the language of due process.²³ Further, as this Court stated in *Gillow v. New York*, 268 U.S. 652, 666 (1925), "freedom of speech and of the press—which are protected by the 1st Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the states." *See also, Near v. Minnesota*, 283 U.S. 697, 707 (1931).

In one sense, the only difference between punitive damages in a libel action and in any other case is the fact that in the former the conduct being punished and deterred is speech. The difference, of course, is significant. The Court has long recognized that any form of state regulation that restricts free speech demands heightened

²³ *See Dun & Bradstreet*, 472 U.S. at 778-79 (Brennan, J., dissenting); *see also*, notes 19-20 and accompanying text, *supra*.

scrutiny of due process concerns.²⁴ The general principle was summarized in *Speiser v. Randall*, 357 U.S. 513, 520 (1957):

When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

Id. at 520 (emphasis added).

This principle is reflected in various rules enunciated by the Court to ensure that any form of government restraint on speech does not reach beyond the permitted bounds to impinge on protected speech. For example:

- In all cases, the burden is on the government to establish that the restraint of speech is justified under the appropriate standard.²⁵
- In cases of doubt, the balance must be struck in favor of protecting speech.²⁶
- Encompassing both the prior rules, speech is presumed protected until proven otherwise with convincing clarity.²⁷

²⁴ See *Young v. American Mini Theatres*, 427 U.S. 50, 76 (1976) (Powell, J., concurring); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Lovell v. Griffin*, 303 U.S. 444 (1938). The award of libel damages is such a "form of state regulation" subject to the rule. See, *New York Times v. Sullivan*, 372 U.S. at 278.

²⁵ E.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (and cases cited therein); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Speiser v. Randall*, 357 U.S. 513, 526 (1957); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-42 (1953).

²⁶ E.g., *Hepps*, 475 U.S. at 776-78; *Gertz*, 418 U.S. at 341.

²⁷ E.g., *New York Times Co. v. United States*, 403 U.S. at 714; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (and cases cited therein); see *Near v. Minnesota*, 283 U.S. at 715-17.

- Those empowered to restrain speech must do so only under narrowly drawn standards to avoid arbitrary and discriminatory content-based action.²⁸
- Courts must independently review judgments that threaten protected speech.²⁹

These are all essentially due process considerations, focused on "the method by which [burdens on speech] are imposed. . . ." See *Browning-Ferris*, 109 S. Ct. at 2924 (O'Connor, J., concurring). In most cases, they are subsumed under the First Amendment analysis, but they remain due process concerns nonetheless,³⁰ and when applied to the award of punitive damages in libel cases, they closely parallel the concerns expressed by members of the Court in *Browning-Ferris* and other recent cases.

B. The Award of Punitive Damages Fails to Satisfy Even Minimum Standards of Due Process.

The precise limits that should apply under the Due Process Clause to any award of punitive damages are fully discussed in the briefs of the parties and other amici. For purposes of this discussion, it is enough to simply note what members of the Court have said in recent opinions addressing the issue.

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), Justice

²⁸ E.g., *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) (and cases cited therein); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969).

²⁹ E.g., *Harte Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2680-81 (1989); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-16 & n.50 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964).

³⁰ See e.g., *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *Freedman v. Maryland*, 380 U.S. 51 (1965).

Blackmun, writing for the Court, acknowledged existing authority for the view "that the Due Process Clause places outer limits on the size of a civil damage award made pursuant to a statutory scheme," but deferred consideration of the question of "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit," because the issue had not been adequately raised in the lower courts. *Id.*

Justice Brennan, joined by Justice Marshall, addressed the majority's recognition of due process limitations on statutory penalties by noting that the guidance given juries in determining punitive damage awards "is scarcely better than no guidance at all," and admonishing the Court to:

look longer and harder at an award of punitive damages based on such skeletal guidance than [it] would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.

Id. at 2923 (Brennan, J., concurring).

Justice O'Connor, joined by Justice Stevens, voiced concern over "skyrocketing" punitive damages awards unlimited by any set of objective standards, and cited her earlier position in *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 89 (1988), in which she, joined by Justice Scalia, observed that "[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Browning-Ferris*, 109 S. Ct. at 2924 (O'Connor, J., concurring in part and dissenting in part).

As previously noted, these same due process concerns, heightened by their First Amendment setting, led four members of the Court in *Dun & Bradstreet* to dissent from the award of punitive damages, even in the context of purely private speech. Justice Brennan, joined by three

other dissenters, also noted that the objections to punitive damages are not confined to First Amendment cases. See *Dun & Bradstreet*, 472 U.S. at 780 n.4. See also *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

More recently, in *The Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2607 n.5 (1989), Justice White, joined by Justice O'Connor and the Chief Justice, expressed concern about the constitutionality of punitive damages in a non-libel (but First Amendment) context:

The Court does not address the distinct constitutional questions raised by the award of punitive damages in this case. . . . That award is more troublesome than the compensatory award discussed above.

(White, J., dissenting) (citations omitted).

From these various opinions, it appears that most members of the Court recognize the need for some constraints on the imposition of punitive damages in civil cases and, at a minimum, that these may include some form of objective standards to guide and limit the discretion of jurors in deciding whether to award punitive damages, and in what amounts.

The participants in this brief urge the Court to consider also whether *any* standards, procedural or otherwise, will adequately address the heightened need for due process protection where speech is the subject of such punitive measures. The unfortunate experience in libel cases has been that mere words, rules, and standards, no matter how carefully defined, are not enough to deter jurors and judges alike from exercising the power to punish unpopular speech and speakers with staggering punitive awards. It may well be that punitive damages are inherently "too blunt a regulatory instrument to satisfy . . . First Amendment principle[s]. . . ." *Dun & Bradstreet*, 472 U.S. at 778 (Brennan, J., dissenting).

C. The Award of Punitive Damages in Libel Cases Fails to Satisfy Heightened Due Process Standards Required by the First Amendment.

The danger punitive damages pose to protected speech was thoroughly explored in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The condemnation of such damages in that case would be enough, standing alone, to declare unconstitutional any punitive award in a libel case involving matters of public interest, were it not for the Court's qualifying language, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349.

This language has been interpreted by some lower courts as a ruling that punitive damages flow automatically where *New York Times* actual malice can be shown.³¹ But the Court in *Gertz* did not discuss the relationship, if any, between a finding of actual malice and the award of punitive damages. The issue was left open and the holding simply confined to "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times*." 418 U.S. at 350. In fact, as noted above,³² the requirement of "actual malice" in libel cases does not even address the questions of malice or evil motive in the common meaning normally required to support a punitive damage award. See *Harte Hanks Communications v. Connaughton*, 109 S. Ct. at 2685. Even minimal due process would require a more rational connection between such

³¹ See, e.g., *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983). Other courts have been less hasty to assume this conclusion, but have continued to uphold punitive awards, in some cases because of their uncertainty. See *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 478 (9th Cir. 1977); *Buckley v. Littell*, 539 F.2d 882, 897 (2d Cir. 1976); *Davis v. Schuchat*, 510 F.2d 731, 737 (D.C. Cir. 1975).

³² See notes 20-21 and accompanying text, *supra*.

punishment and the purpose it supposedly serves. In libel cases, that connection may not exist at all.

According to the Court in *Gertz*, the legitimate state interest underlying the law of libel "extends no further than compensation for actual injury," 418 U.S. at 348-49, and "punitive damages are wholly irrelevant to th[at] state interest," *id.* at 350. Therefore, the justification for punitive damages in such libel cases must be assessed on its own merits; it does not flow automatically from the rationale for compensatory damages.

For First Amendment purposes, punitive damages must be viewed independently, as a form of government action that seeks to punish and to deter speech. As such, they must be subjected to the same careful scrutiny and heightened due process considerations that would be required of any statutory scheme that attempted to accomplish the same ends. See *New York Times Co. v. Sullivan*, 376 U.S. at 277 ("What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."). Viewed in this perspective, it is clear that the award of punitive damages in libel cases, at least those involving matters of public interest, fails utterly to satisfy the heightened due process mandated by the First Amendment.

First, the declared purpose to deter future speech is fundamentally at odds with the purposes of the First Amendment to encourage free and open debate and to prevent self-censorship. See *Gertz*, 418 U.S. at 350; See also *Near v. Minnesota*, 283 U.S. 697, 713-20 (1931).

Second, punitive damages are awarded without narrowly-drawn standards and by juries who are given broad discretion to punish unpopular speech and speakers. Even if theoretical standards could be imposed, the process remains one of punishment based on the content of speech.

Third, the award of punitive damages, even in concept, fails to provide the "breathing space" required in

discussion of public affairs. Even under the most careful standards, it is impossible to ensure that the future speech intended to be deterred will be only speech that is unprotected by the First Amendment. Such broad-based restraints in a statutory scheme would be clearly unconstitutional. *See Freedman v. Maryland*, 380 U.S. 51 (1965).

In short, although it may be theoretically possible to formulate standards and procedures that would ensure punishment of only unprotected speech, the constitutional defects in the whole concept of punitive damages cannot be addressed simply by careful drafting. The intent to restrain future speech and the inherent discretion granted to juries under any such standards are fundamentally at odds with the First Amendment.

D. Standardless and Deferential Appellate Review of Punitive Damage Awards Cannot Satisfy Constitutional Requirements.

Despite the long-standing requirement of independent appellate review to protect against any judgment that threatens First Amendment rights, *see, e.g., New York Times Co.*, 376 U.S. at 284-86; *Bose*, 466 U.S. at 498-511, all too often appellate courts have refused to disturb judgments of punitive damages in libel cases unless "monstrously excessive" or so large as to "shock the judicial conscience."³³ In the First Amendment context, such elusive standards of review afford too little protection against abuse and are inconsistent with appellate courts' duty to "independently decide whether the evidence in the record is sufficient to cross the constitu-

³³ *See Gertz*, 418 U.S. at 350; *Brown & Williamson v. Jacobson*, 827 F.2d at 1141 (multi-million dollar punitive damage award upheld because jury was not "mere putty in the hands of the plaintiff"); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1143-44 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986); *Braun v. Flynt*, 726 F.2d 245, 257 (5th Cir.), *cert. denied*, 469 U.S. 883 (1984).

tional threshold'" marked by the First Amendment. *Harte Hanks Communications v. Connaughton*, 109 S. Ct. at 2695 (quoting *Bose*, 466 U.S. at 511).

The Court in *Bose* explained that a jury's application of First Amendment principles:

is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks . . . ' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.

466 U.S. at 510 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) and *New York Times Co.*, 376 U.S. at 270). The threat of unrestrained damages equally jeopardizes First Amendment interests, *Dun & Bradstreet*, 472 U.S. at 770 (White, J., concurring), and the appellate court's duty under *Bose* to protect against the entry of any judgment that encroaches upon protected speech logically extends to judgments of punitive damages as well. *See Bose*, 466 U.S. at 511.

Whether the conduct at issue warrants the imposition of enormous civil fines meant to deter speech in the future is a determination that cannot be reviewed solely for whether a jury acted out of "passion and prejudice," or whether the amount is "excessive," or even whether it bears some "rational relationship" to harm caused in the past. The First Amendment requires far more precise limits. So long as juries retain discretion to punish and deter speech, even appellate courts cannot effectively protect against unconstitutional excess in the award of damages.

CONCLUSION

The harm caused by punitive damage awards—the threat to First Amendment and other societal values, the encouragement of unnecessary litigation, and above all, harm to the integrity of fundamental concepts of due process—when weighted against the theoretical justifications offered in the defense of such awards, leads to the conclusion that punitive damages are a remedy that society cannot afford and the Constitution does not permit.

Of Counsel:

DOUGLAS P. JACOBS
CBS Inc.
51 West 52nd Street
New York, New York 10019
Attorney for CBS Inc.

P. CAMERON DEVORE *
MARSHALL J. NELSON
DONALD S. KUNZE
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

Counsel for Amici Curiae

* Counsel of Record

STEVEN SADCARIO
Capital Cities/ABC, Inc.
47 West 66th Street
New York, New York 10023
*Attorney for Capital Cities/
ABC, Inc.*

RICHARD J. TOFEL
Dow Jones & Company, Inc.
200 Liberty Street
New York, New York 10281
*Attorney for
Dow Jones & Company, Inc.*

VICTOR F. GANZI
ROBERT J. HAWLEY
The Hearst Corporation
959 Eighth Avenue
New York, New York 10019
*Attorneys for
The Hearst Corporation*

JOHN C. FONTAINE
Knight-Ridder, Inc.
One Herald Plaza
Miami, Florida 33132
*Attorney for
Knight-Ridder, Inc.*

SANDRA S. BARON
National Broadcasting
Company, Inc.
30 Rockefeller Plaza
New York, New York 10112
*Attorney for National
Broadcasting Company, Inc.*

CONSTANCE A. HEYMANN
Reuters Information
Services Inc.
1700 Broadway
New York, New York 10019
*Attorney for Reuters
Information Services Inc.*

HARRY M. JOHNSTON III
The Time Inc. Magazine
Company
1271 Avenue of the Americas
New York, New York 10020
*Attorney for The Time Inc.
Magazine Company*

DAVID D. HILLER
Tribune Company
435 N. Michigan
Chicago, Illinois 60611
Attorney for Tribune Company

JAMES L. ARNOLD
United Press International, Inc.
9990 Lehigh Way, Third Floor
Fairfax, Virginia 22030
*Attorney for United Press
International, Inc.*

BARBARA PERCIVAL
The Washington Post
1150 - 15th Street, N.W.
Washington, D.C. 20071
*Attorney for
The Washington Post*

MARTIN P. MESSINGER
MARK H. CHARLES
Westinghouse Broadcasting
Company, Inc.
888 Seventh Avenue, 39th Floor
New York, New York 10106
*Attorneys for Westinghouse
Broadcasting Company, Inc.*

RICHARD M. SCHMIDT, JR.
COHN & MARKS
1333 New Hampshire Ave.
Suite 600
Washington, D.C. 20036
*Attorney for
American Society of
Newspaper Editors*

R. BRUCE RICH
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
*Attorney for
Association of
American Publishers*

TINA A. RAVITZ
Vice President and Chief Counsel
Newsweek, Inc.
444 Madison Avenue
New York, New York 10022
*Attorney for Magazine
Publishers of America, Inc.*

HENRY L. BAUMANN
 STEVEN A. BOOKSHESTER
 National Association
 of Broadcasters
 1771 N Street, N.W.
 Washington, D.C. 20036
*Attorneys for National
 Association of Broadcasters*

JANE E. KIRTLLEY
 Executive Director
 Reporters Committee for
 Freedom of the Press
 Suite 504
 1735 Eye St., N.W.
 Washington, D.C. 20006
*Attorney for Reporters
 Committee for Freedom
 of the Press*

BRUCE W. SANFORD
 BAKER & HOSTETLER
 1050 Connecticut Ave., N.W.
 Washington, D.C. 10006
*Attorney for The Society
 of Professional Journalists*

J. LAURENT SCHARFF
 REED SMITH SHAW & MCCLAY
 1200 18th Street, N.W.
 Washington, D.C. 20036
*Attorney for Radio-Television
 News Directors Association*

APPENDIX

APPENDIX

Identity of Individual Amici

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

Capital Cities/ABC, Inc., through its subsidiaries, owns national radio and television networks, television and radio stations, daily and weekly newspapers, and other publications, all of which are engaged in the gathering and dissemination of news to the public.

Dow Jones & Company, Inc. publishes, inter alia, *The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly*, the *Dow Jones News Services* and, through its Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states.

The Hearst Corporation is a diversified privately held communications company. It publishes numerous nationally distributed consumer magazines, daily and non-daily newspapers, business publications and hard-cover and soft-cover books. It also owns and operates a leading features syndicate and several television and radio broadcast stations.

Knight-Ridder, Inc., is an international information and communications company engaged in newspaper publishing, business and news and information services, electronic retrieval services, news, graphics and photo services, cable television, and newsprint production. The Miami-based company publishes 29 daily newspapers. Its various information services reach more than 100 million people in 129 countries.

National Broadcasting Company, Inc., itself and its subsidiaries, own and operate a national television network and television stations, all of which are engaged in the gathering and dissemination of news to the public.

Reuters Information Services Inc. is the primary North American operating company of Reuters Holdings PLC, the international news and financial information organization. Reuters supplies information to both business subscribers and to the news media. It obtains its information from approximately 160 exchanges and over-the-counter markets, from data contributed directly by more than 3,715 subscribers in 82 countries and from a network of some 1,270 journalists and photographers.

The Time Inc. Magazine Company is the largest publisher of general circulation magazines in the United States. It publishes *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money*, and *Life*.

Tribune Company is a communications company owning *The Chicago Tribune*, *The New York Daily News*, the *Orlando Sentinel*, the *Fort Lauderdale News and Sun-Sentinel*, the *Escondido (CA) Times-Advocate*, the *Palo Alto Times-Tribune*, the *Newport News*, *Virginia Daily Press*, and *The Times Herald*, and television stations in Chicago, New York, Los Angeles, Denver, Atlanta and New Orleans.

United Press International, Inc. generates and compiles news and information reports and produces photographs on a worldwide basis, all of which are transmitted for sale primarily to media industry subscribers such as newspapers and radio and television broadcasters. It maintains 200 offices and bureaus in 90 countries, staffed by 1,500 full-time employees and 4,000 contributing correspondents.

The Washington Post is a newspaper published in the Washington, D.C. area with a daily circulation of 773,000 and a Sunday circulation of 1,126,000.

Westinghouse Broadcasting Company, Inc. through its subsidiaries owns and operates five network affiliated television stations and 20 radio stations, including four all-news radio stations. It is also a producer and distributor of broadcast and cable programming.

The American Society of Newspaper Editors is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include ongoing efforts to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, text books and educational materials. Its more than 200 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers including university presses and scholarly associations.

Magazine Publishers of America, Inc. is a national trade association including in its present membership 218 domestic magazine publishers who publish 756 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and past-times of the American people.

The National Association of Broadcasters, organized in 1922, is a nonprofit incorporated trade association which serves and represents America's radio and television stations and all the major networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

Radio-Television News Directors Association is a professional association of electronic journalists. The As-

sociation has more than 2,500 members who gather, edit and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every recent Supreme Court case involving the First Amendment rights of reporters to gather and disseminate news and information. It has provided representation, information, legal guidance, or research in virtually every major press freedom case litigated since 1970.

The Society of Professional Journalists is a voluntary, not-for-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

(23)
No. 89-1279

Supreme Court, U.S.
FILED

JUN 1 1990

ROBERT F. SPANIO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY, PETITIONER

v.

CLEOPATRA HASLIP, ET AL., RESPONDENTS

**On Writ of Certiorari to the
Supreme Court of Alabama**

**BRIEF FOR THE BUSINESS ROUNDTABLE AND THE
PRODUCT LIABILITY ADVISORY COUNCIL, INC.,
AS AMICI CURIAE SUPPORTING PETITIONER**

ANDREW L. FREY

Counsel of Record

KENNETH S. GELLER

MARK I. LEVY

ANDREW J. PINCUS

Mayer, Brown & Platt

2000 Pennsylvania Ave., N.W.

Washington, D.C. 20006

(202) 778-0602

Counsel For Amici Curiae

QUESTION PRESENTED

This brief will address the following question:

Whether the punitive damages award in this case violates the Due Process Clause because the amount of the penalty imposed is not rationally related to the purposes of fairly punishing the misconduct that occurred or appropriately deterring such misconduct.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THE PUNITIVE DAMAGES AWARD IN THIS CASE VIOLATES DUE PROCESS BECAUSE IT IS NOT RATIONALLY RELATED TO THE PUR- POSES OF PUNISHMENT OR DETERRENCE....	4
I. THE DUE PROCESS CLAUSE PROHIBITS DISPROPORTIONATE AND IRRATIONAL AWARDS OF PUNITIVE DAMAGES	5
A. A Punitive Damages Award That Is Arbi- trary And Irrational In Amount Deprives The Defendant Of Property Without Due Process	5
B. A Punitive Damages Award Is Arbitrary And Irrational If It Is Disproportionate To The Objectives Of Imposing Punishment.....	8
II. AN AWARD OF PUNITIVE DAMAGES IS DISPROPORTIONATE AND IRRATIONAL IF IT SUBSTANTIALLY EXCEEDS ANALO- GOUS STATUTORY PENALTIES AND BEARS NO REASONABLE RELATIONSHIP TO THE NATURE OR GRAVITY OF THE DEFENDANT'S CONDUCT	10
A. Punitive Damages Are Disproportionate If They Substantially Exceed The Statutory Penalties Prescribed By The Legislature.....	13
B. Punitive Damages Are Disproportionate If They Do Not Bear A Reasonable Relation- ship To The Misconduct For Which Punish- ment Is Being Imposed	14

TABLE OF CONTENTS—Continued

	Page
1. Character of the defendant's conduct.....	15
2. Injury caused by the misconduct	17
3. Actual or potential gain to the defendant..	19
III. THE PUNITIVE DAMAGES AWARD IN THIS CASE IS PLAINLY EXCESSIVE	20
A. The Award Is Grossly Disproportionate To Statutory Penalties In Alabama And Other Jurisdictions	21
B. The \$1,000,000 Penalty Bears No Reasonable Relationship To The Gravity Of The Con- duct Being Punished	23
C. Alabama's Post-Verdict Review Procedures Do Not Eliminate The Unconstitutionality Of The Punitive Award In This Case	28
CONCLUSION	29

TABLE OF AUTHORITIES

Cases:	Page
<i>AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.</i> , 896 F.2d 1035 (7th Cir. 1990)	11
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	8
<i>Berkey Photo, Inc. v. Eastman Kodak Co.</i> , 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980)	20
<i>Browning-Ferris Industries of Vermont, Inc. v.</i> <i>Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989)	<i>passim</i>
<i>Chicago & N.W. Ry. v. Nye Schneider Fowler Co.</i> , 260 U.S. 35 (1922)	8, 9
<i>City of Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981)	15
<i>City of Revere v. Massachusetts General Hospital</i> , 463 U.S. 239 (1983)	7
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	5
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	9
<i>Gore v. United States</i> , 357 U.S. 386 (1958)	11
<i>Hawkins v. Allstate Insurance Co.</i> , 733 P.2d 1073 (Ariz.), cert. denied, 484 U.S. 874 (1987)	20
<i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46 (1988)	5
<i>International Brotherhood of Electrical Workers</i> <i>v. Foust</i> , 442 U.S. 42 (1979)	6
<i>Lassiter v. Department of Social Services</i> , 452 U.S. 18 (1981)	5
<i>Life & Casualty Ins. Co. v. McCray</i> , 291 U.S. 566 (1934)	17
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	5
<i>Memphis Community School Dist. v. Stachura</i> , 477 U.S. 299 (1986)	18
<i>Missouri Pac. Ry. v. Humes</i> , 115 U.S. 512 (1985)	6
<i>Missouri Pac. Ry. v. Tucker</i> , 230 U.S. 340 (1913) ..	7
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	5
<i>North Georgia Finishing, Inc. v. Di-Chem, Inc.</i> , 419 U.S. 601 (1975)	5
<i>Robinson v. California</i> , 370 U.S. 660 (1962)	20
<i>Rowlett v. Anheuser-Busch, Inc.</i> , 832 F.2d 194 (1st Cir. 1987)	15-16, 17

TABLE OF AUTHORITIES—Continued

	Page
<i>Seaboard Air Line Ry. v. Seegers</i> , 207 U.S. 73 (1907)	19
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	6, 18
<i>Solem v. Helm</i> , 463 U.S. 277 (1983)	<i>passim</i>
<i>Southwestern Tel. & Tel. Co. v. Danaher</i> , 238 U.S. 482 (1915)	7
<i>Stack v. Boyle</i> , 342 U.S. 1 (1951)	9
<i>St. Louis, I.M. & S. Ry. v. Williams</i> , 251 U.S. 63 (1919)	6, 8, 19
<i>United States v. Busher</i> , 817 F.2d 1409 (9th Cir. 1987)	17, 19-20
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	9
<i>United States v. United Mine Workers</i> , 330 U.S. 258 (1947)	9
<i>United States v. United States Steel Corp.</i> , 251 U.S. 417 (1920)	20
<i>Waters-Pierce Oil Co. v. Texas</i> , 212 U.S. 86 (1909)	6, 7, 8
<i>Weems v. United States</i> , 217 U.S. 349 (1910)	11, 13
Constitution and Statutes:	
United States Constitution	
Amend. VIII	7, 8
Amend. XIV	<i>passim</i>
42 U.S.C. § 1983	15
Ala. Code:	
§ 5-5A-10	22
§ 5-20-7	22
§ 6-6-9	22
§ 8-19-11	22
§ 13A-5-11	21
§ 13A-5-12(a) (1)	21
§ 13A-12-3	22
§ 14-6-21	22
§ 22-9-78	22
§ 22-22A-5	22
§ 22-30-19	22
§ 27-1-12	21

TABLE OF AUTHORITIES—Continued

	Page
§ 27-12-17	21
§ 27-12-23	21
§ 27-29-10	22
§ 34-23-52	22
§ 34-7-25	22
Ariz. Rev. Stat.:	
§ 13-801	23
§ 13-803	23
Miscellaneous:	
ABA Special Comm. on Punitive Damages, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION (1986)	19
American College of Trial Lawyers, REPORT ON PUNITIVE DAMAGES (1989)	19
J. Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1892 ed.)	14, 20
Cooter, <i>Punitive Damages for Deterrence: When and How Much?</i> , 40 ALA. L. REV. 1143 (1989)	20, 24
Dobbs, <i>Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies</i> , 40 ALA. L. REV. 831 (1989)	20
Elliott, <i>Why Punitive Damages Don't Deter Corporate Misconduct Effectively</i> , 40 ALA. L. REV. 1053 (1989)	10
Ellis, <i>Fairness and Efficiency in the Law of Punitive Damages</i> , 56 S. CAL. L. REV. 1 (1982)	20
Ellis, <i>Punitive Damages in Iowa Law: A Critical Assessment</i> , 66 IOWA L. REV. 1003 (1981)	18
1 & 2 J. Ghiardi & J. Kircher, PUNITIVE DAMAGES LAW AND PRACTICE (1985)	16, 24
H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968)	14
P. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988)	4
Huber, <i>No-Fault Punishment</i> , 40 ALA. L. REV. 1037 (1989)	24

TABLE OF AUTHORITIES—Continued

	Page
C. McCormick, HANDBOOK ON THE LAW OF DAMAGES (1935)	18
1 M. Minzer, <i>et al.</i> , DAMAGES IN TORT ACTIONS (1989)	18
Morris, <i>Punitive Damages in Tort Cases</i> , 44 HARV. L. REV. 1173 (1931)	18
Owen, <i>Punitive Damages in Products Liability Litigation</i> , 74 MICH. L. REV. 1258 (1976)	20
K. Redden, PUNITIVE DAMAGES (1980 & 1987 CAL FINDINGS (1987)	4
K. Redden, PUNITIVE DAMAGES (1980 & 1987 Supp.)	17
RESTATEMENT (SECOND) OF TORTS (1979)	6, 16, 17
Wheeler, <i>A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation</i> , 40 ALA. L. REV. 919 (1989)	20

In the Supreme Court of the United States

OCTOBER TERM, 1989

 No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY, PETITIONER

v.

CLEOPATRA HASLIP, ET AL., RESPONDENTS

 On Writ of Certiorari to the
 Supreme Court of Alabama

 BRIEF FOR THE BUSINESS ROUNDTABLE AND THE
 PRODUCT LIABILITY ADVISORY COUNCIL, INC.,
 AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE

The Business Roundtable is an association of the chief executive officers of approximately 200 of the largest companies in the Nation. The Roundtable examines public issues that affect the economy and develops positions that seek to reflect sound economic and social policies. The Product Liability Advisory Council, Inc., is an association of major industrial companies formed for the purpose of filing amicus curiae briefs in cases involving significant issues affecting the law of product liability. Amici have an interest in the resolution of this case because their members frequently are defendants in actions in which punitive damages are sought. Amici's members thus face on a daily basis the threat of irra-

tional and excessive punitive damages awards that is an omnipresent feature of the current punitive damages system.¹

SUMMARY OF ARGUMENT

It is well settled that the Due Process Clause prohibits civil monetary penalties that are arbitrary and irrational. The decisions of this Court establish that a civil penalty violates due process if it is disproportionate to the objectives sought to be achieved by the imposition of such punishment. That analysis is fully applicable to punitive damages awards; an award that is not rationally related to the retributive and deterrent purposes of punitive damages is unconstitutionally excessive.

Under the proportionality analysis of *Solem v. Helm*, 463 U.S. 277 (1983), an award of punitive damages is arbitrary and irrational if it (a) is disproportionate to criminal and civil penalties established by the legislature for similar conduct or (b) bears no reasonable relationship to the nature and gravity of the defendant's conduct. The legislative process is well suited for determining the level of punishment that is appropriate in light of the type of misconduct involved and the penalties provided for other categories of wrongdoing; accordingly, the legislature's judgment provides a significant objective benchmark for judging the excessiveness of the punishment meted out by a jury in the context of a punitive damages award. In addition, punitive damages must be rationally related to the nature of the defendant's wrong, including in particular the degree of the defendant's culpability and (to the extent not already accounted for in the compensatory damages award) the amount of the gain to the defendant or loss to the plaintiff that resulted from the misdeeds.

¹ Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Applying this standard here, it is clear that the \$1,000,000 punitive damages award is excessive and irrational. The award is grossly disproportionate to legislatively prescribed penalties in Alabama and elsewhere for even the most severe wrongdoing. Such penalties seldom exceed the range of \$10,000 to \$100,000—a level of punishment some 10 to 100 times lower than the punitive damages award selected by the jury.

Likewise, the award bears no conceivable relationship to the misconduct being punished. If Lemmie Ruffin, the miscreant insurance agent, is viewed as the object of the punishment, his actions, while intentional and serious, caused only a small gain to himself and slight harm to Mrs. Haslip (her actual damages were \$4,000 and her total compensatory damages were \$40,000) in relation to the enormous punitive award. If, on the other hand, Pacific Mutual is being punished for corporate wrongdoing, a large award is equally unjustified. Ruffin did not engage in his misconduct pursuant to any company policy (indeed, he violated company policy), nor did he act with the knowledge or approval of corporate management; his actions were not in any way in furtherance of the company's interest, since his defalcation benefited only himself and occurred at the expense of the company. Thus, while we doubt that Pacific Mutual is properly subject to punishment at all in these circumstances, it certainly cannot be held liable for anything approaching \$1,000,000 in punitive damages.

ARGUMENT

THE PUNITIVE DAMAGES AWARD IN THIS CASE VIOLATES DUE PROCESS BECAUSE IT IS NOT RATIONALLY RELATED TO THE PURPOSES OF PUNISHMENT OR DETERRENCE

There can be no doubt that "[a]wards of punitive damages are skyrocketing." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., concurring and dissenting). In the past, punitive damages were awarded in only a small fraction of cases where the challenged conduct was egregiously offensive; today, as this case illustrates, the distinction between the culpability sufficient to support liability for compensatory damages and the culpability warranting punitive damages has all but collapsed. In the past, punitive damages were awarded in modest amounts; today, as this case illustrates, many awards are breathtakingly large. In the past, punitive damages awards generally bore a discernible relationship to the offensiveness of the defendant's behavior and roughly accorded with fines applicable to analogous criminal conduct; today, as this case illustrates, punitive damages often simply reflect sympathy for the plaintiff or the size of the defendant's pocketbook. See, e.g., P. Huber, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 127 (1988); M. Peterson, *et al.*, *PUNITIVE DAMAGES: EMPIRICAL FINDINGS* 65 (1987).

Petitioner Pacific Mutual Life Insurance Company has presented a number of substantial constitutional challenges to the million dollar punitive damages award in this case. We fully agree with Pacific Mutual that due process forbids the imposition of any punishment on account of its actions (see pages 23-25, *infra*) and that the jury's verdict was the product of a gravely flawed set of procedures. However, assuming *arguendo* that some punishment of Pacific Mutual could be sustained following the trial that was held and on the facts shown, we none-

theless believe that the amount of punitive damages awarded by the jury deprives Pacific Mutual of its property without due process because the punishment is wholly disproportionate to the company's wrongful conduct and does not rationally advance the purposes of exacting punitive damages.

I. THE DUE PROCESS CLAUSE PROHIBITS DISPROPORTIONATE AND IRRATIONAL AWARDS OF PUNITIVE DAMAGES

A. A Punitive Damages Award That Is Arbitrary And Irrational In Amount Deprives The Defendant Of Property Without Due Process.

The Due Process Clause of the Fourteenth Amendment "protect[s] * * * against arbitrary action[s] of government" * * * regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citation omitted). See also, e.g., *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981) (due process "expresses the requirement of 'fundamental fairness'"). And, as the Court has repeatedly held, the protections of the Due Process Clause extend to "civil * * * defendants [seeking] to protect their property." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). It follows that a disproportionate award of punitive damages—one that bears no rational relationship to the purposes for which the damages have been exacted—violates due process of law.

There can be no doubt that the imposition of punitive damages constitutes a government-compelled deprivation of property.² Accordingly, the Due Process Clause re-

² A punitive damages award plainly is state action subject to the Due Process Clause. It is embodied in the judgment of a state court—which itself constitutes state action—and state law obligates the defendant to pay the judgment. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

quires that the deprivation not be arbitrary or irrational. As this Court recently noted, punitive damages are intended to "advance the interests of punishment and deterrence." *Browning-Ferris*, 109 S. Ct. at 2920. See also *Smith v. Wade*, 461 U.S. 30, 49, 54 (1983); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (citation and internal quotation marks omitted) ("Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); RESTATEMENT (SECOND) OF TORTS § 908 comment a (1979). Therefore, an award of punitive damages satisfies due process only if it reasonably serves to punish and deter. Any part of a punitive damages judgment that is larger than necessary to accomplish those purposes has no legitimate justification and amounts to nothing less than an arbitrary, irrational, and fundamentally unfair transfer of the defendant's property to the plaintiff.

In light of these principles, it is not surprising that this Court has long recognized that the Due Process Clause prohibits excessive civil monetary penalties in litigation between private parties. In *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), in considering a due process challenge to a state civil penalty, the Court stated unequivocally that the Constitution would be violated by "fines * * * [that] are so grossly excessive as to amount to a deprivation of property without due process of law." Similarly, in *St. Louis, I.M. & S. Ry. v. Williams*, 251 U.S. 63 (1919), the Court recognized that the Due Process Clause "places a limitation upon the power of the States to prescribe [civil] penalties" that are "wholly disproportioned to the offense and obviously unreasonable." 251 U.S. at 66-67; see also *Missouri Pac. Ry. v. Humes*, 115 U.S. 512, 523 (1885) (reviewing constitutionality of statutory double-damages penalty under the Due Process Clause).

The Court has applied these principles to invalidate disproportionate civil penalties. For example, in *Missouri*

Pac. Ry. v. Tucker, 230 U.S. 340 (1913), the Court struck down a penalty of \$500 for a \$3.02 overcharge, holding that the penalty was "grossly out of proportion to the possible actual damages" and therefore in violation of due process. 230 U.S. at 351 (citing *Waters-Pierce*); see also *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-491 (1915) (invalidating penalty on due process grounds). The Court recently acknowledged these precedents in the decision in *Browning-Ferris*, 109 S. Ct. at 2921; see also *id.* at 2923 (Brennan, J., concurring).³

Although the Court has not heretofore had occasion to apply the Due Process Clause to a punitive damages award, we can imagine no reasoned justification for limiting the protection against excessive civil penalties to penalties imposed pursuant to statute. The harm to a defendant from an irrational government-imposed civil penalty is no less simply because the penalty is imposed pursuant to a common law rule. To the contrary, the danger of arbitrary government action, and therefore the need for constitutional protection, is far greater when a jury is permitted to exercise essentially unbridled discretion in fixing the amount of the penalty. See *Browning-Ferris*, 109 S. Ct. at 2923 (Brennan, J., concurring); see also pages 11-12, *infra*.

The conclusion that the Due Process Clause provides protections in this context analogous to those afforded by the Excessive Fines Clause with respect to criminal fines is consistent with this Court's decisions in other areas in which the Eighth Amendment does not apply due to technical limitations on its scope. In *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), for example, the Court held that, even though the Eighth Amendment was inapplicable, the Due Process Clause required that medical care be provided to a

³ Significantly, even the plaintiff in *Browning-Ferris* did not dispute that the Due Process Clause imposes a substantive limit on punitive damages awards. 88-556 Resp. Br. 7, 29.

person injured while being arrested. "In fact," the Court stated, "the due process rights of a person in [that] situation are at least as great as the Eighth Amendment protections available to a convicted prisoner." 463 U.S. at 244; see also *Bell v. Wolfish*, 441 U.S. 520, 535-536 & n.16 (1979) (Due Process Clause protects pretrial detainees, who are not entitled to Eighth Amendment protection because they have not been convicted).

The same approach is proper in the present context. The Court's conclusion in *Browning-Ferris* that technical limitations on the Excessive Fines Clause place punitive damages awards to private parties beyond that Clause's reach does not justify exempting such awards from all constitutional scrutiny. Indeed, it would be astounding if the Due Process Clause offered no protection against irrational government action that deprived a defendant of an exorbitant sum of money simply because the deprivation occurred in the context of private civil litigation and was labeled "punitive damages."

B. A Punitive Damages Award Is Arbitrary And Irrational If It Is Disproportionate To The Objectives Of Imposing Punishment.

As in other areas of substantive due process, the governing constitutional standard is one of rationality. This Court's decisions establish that punishment violates the Due Process Clause if it is "wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry.*, 251 U.S. at 67. See also *Chicago & N.W. Ry. v. Nye Schneider Fowler Co.*, 260 U.S. 35, 44 (1922) (to be valid, "penalties * * * must be moderate and reasonably sufficient to accomplish their legitimate object"; those that are "plainly arbitrary and oppressive" violate the Due Process Clause); *Waters-Pierce*, 212 U.S. at 111 ("grossly excessive" civil penalties violate due process).

Of course, the question whether a penalty is "unreasonable" or "disproportion[ate] to the offense" cannot be answered in a vacuum or by a wholly subjective and standardless inquiry of the kind all too many courts currently

engage in when reviewing punitive damages awards. This Court has firmly rejected such an ad hoc approach, instead assessing the constitutionality of civil penalties by evaluating whether they are no more than is "reasonably sufficient to accomplish their legitimate object." *Nye Schneider Fowler Co.*, 260 U.S. at 44. That is the same approach the Court has utilized in other contexts in which it must evaluate the proportionality and reasonableness of government action.

For example, in determining whether a criminal sentence is disproportionate to a particular offense and thus violates the Cruel and Unusual Punishments Clause, the Court inquires whether the sentence is justified by reference to the purposes of criminal penalties—deterrence and punishment. *Enmund v. Florida*, 458 U.S. 782, 800-801 (1982). That analogy is particularly probative in view of the fact that punitive damages have the same deterrent and penal purposes as criminal sanctions.

Similarly, bail is excessive within the meaning of the Eighth Amendment if it is "set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose" of bail—ensuring the presence of the defendant. *Stack v. Boyle*, 342 U.S. 1, 5 (1951). See also *United States v. Salerno*, 481 U.S. 739, 754 (1987) (emphasis added) ("when the government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more"); *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947) (a court should calculate the appropriate fine for civil contempt by looking to the purposes for which the fine is imposed).

Here too, courts should judge the rationality of the government action by reference to its purposes. So long as an award of punitive damages is "no more" than is "reasonably calculated" to serve the purposes of deterrence and punishment, it will pass muster under the Due Process Clause. If, on the other hand, the award exceeds any amount reasonably justified in light of these

purposes, it is a disproportionate and irrational sanction that violates the Constitution.⁴ As we now discuss, this Court's decision in *Solem v. Helm*, 463 U.S. 277 (1983), provides the appropriate judicial standard for this inquiry.

II. AN AWARD OF PUNITIVE DAMAGES IS DISPROPORTIONATE AND IRRATIONAL IF IT SUBSTANTIALLY EXCEEDS ANALOGOUS STATUTORY PENALTIES AND BEARS NO REASONABLE RELATIONSHIP TO THE NATURE OR GRAVITY OF THE DEFENDANT'S CONDUCT

The basic framework for analyzing the proportionality of civil penalties was established in *Solem v. Helm*, which involved the closely related question of how to determine whether criminal penalties are disproportionate to the defendant's wrongdoing. First, the Court compared "the gravity of the offense and the harshness of the penalty" (463 U.S. at 290-291). Next, it assessed the reasonableness of that relationship by measuring it against the sentences that could be imposed for other offenses in the same jurisdiction and the sentences authorized for the same offense in other jurisdictions. *Id.* at 291-292, 298-300. These factors—modified so as to shift the focus to

⁴ Some have suggested that the haphazard and unpredictable character of today's punitive damages awards is a virtue because it prevents companies from treating misconduct simply as a calculable cost of doing business. See Brief of Consumers Union of the United States, *et al.*, as Amici Curiae in *Browning-Ferris*, at 42-51. Such irrationality is not only unacceptable as an instrument of government but ineffectual to control misconduct. A predictable, properly proportioned punishment is the most effective possible deterrent, because the actor would know in advance that it would lose, not gain, by engaging in the conduct in question. See Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989). Moreover, the argument that a system of punishment must be irrational and unpredictable in order to be effective would apply equally to criminal sanctions, but this Court made clear in *Solem v. Helm*, 463 U.S. 277 (1983), that criminal penalties must be proportional to the offense and rational in light of the purposes for which the sanction is imposed.

punitive damages rather than criminal sentences—should also guide the present inquiry. *Browning-Ferris*, 109 S. Ct. at 2933-2934 (O'Connor, J., concurring and dissenting).⁵

In applying the *Solem* factors, however, it is important to appreciate the critical distinction between a criminal sentence imposed by a court pursuant to statutory standards and a punitive damages verdict announced by a jury in the exercise of virtually untrammelled discretion. A jury's unguided award of punitive damages is not entitled to judicial deference comparable to that which is appropriate for punishments that fall within a legislatively prescribed range.

A legislature's decision to authorize the imposition of a particular sanction for a particular type of misconduct reflects a finding—either explicit or implicit—that there is a reasonable relationship between the sanction and the misconduct. In view of the legislature's superior ability to gather relevant facts, ascertain and express the values of the community, and establish a proportional system of sanctions by considering each offense as part of the broader universe of wrongful conduct and fixing the proper relationship between various categories of offenses, the legislature's determinations of reasonableness plainly should be accorded "substantial deference." *Solem*, 463 U.S. at 290; see also *Gore v. United States*, 357 U.S. 386, 393 (1958) (the proper apportionment of punishment is "peculiarly [a] question[] of legislative policy"); *Weems v. United States*, 217 U.S. 349, 378 (1910).

⁵ The evaluation of the rationality of a punitive damages award should reflect as well the common-sense principle that "[t]he greater the sanction, the more confidence there should be that it is justified." *AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.*, 896 F.2d 1035, 1044 (7th Cir. 1990). A court should look more closely at a punishment of, for example, \$500,000 than at one of \$5,000. Large awards, such as those of \$1 million or more, should receive especially close scrutiny.

"Substantial deference" is appropriate, though, only when the legislature has in fact authorized the sanction under review. As Justice Brennan observed in *Browning-Ferris*, "scrutiny of awards made without the benefit of a legislature's deliberation and guidance [should] be less indulgent than * * * consideration of those that fall within statutory limits." 109 S. Ct. at 2923 (concurring opinion); see also *id.* at 2934 (O'Connor, J., concurring and dissenting) (substantial deference should be accorded to legislative judgments).

A jury hearing a single case differs from a legislature in at least one especially relevant respect. The jury considers its case in isolation and in retrospect. Unlike a legislature, the jury lacks the information and expertise needed to place the particular defendant's actions in the context of the entire range of behavior that society deems wrongful and has no knowledge of the scale of punishments to which other wrongdoers are subjected. An unguided jury is therefore much less likely than a legislature to be able to devise a punishment that is appropriately proportioned to the relative wrongfulness of the defendant's conduct. Accordingly, in applying the *Solem* standard to an award of punitive damages, courts should give little deference to the jury's determination of the proper punishment but rather should closely scrutinize the reasonableness of such an award in determining whether it passes muster under the Due Process Clause. *Browning-Ferris*, 109 S. Ct. at 2923 (Brennan, J., concurring) (it is appropriate to "look longer and harder at an award of punitive damages based on such skeletal guidance than * * * at one situated within a range of penalties as to which responsible officials had deliberated and then agreed").

With this preface, we now briefly sketch the factors that should be considered in determining whether a punitive damages award is so disproportionate to the defendant's misconduct as to violate due process.

A. Punitive Damages Are Disproportionate If They Substantially Exceed The Statutory Penalties Prescribed By The Legislature.

As in most states today, a jury's award of punitive damages in Alabama is not constrained by any legislatively determined ceiling. In this circumstance, the excessiveness inquiry should first compare the penalty selected by the jury with the sanctions set forth in relevant criminal and civil penalty statutes in order to determine whether the award is in line with punishments fixed by the legislature for similar conduct. See *Solem*, 463 U.S. at 291-292; see also *Weems*, 217 U.S. at 380-381. For the reasons just discussed, the legislature's judgment in setting criminal fines and civil penalties—which, like punitive damages, are designed to further the goals of punishment and deterrence—furnishes a powerful objective standard for a court assessing the reasonableness of a punitive damages award.

If the jury's punishment significantly exceeds the penalty range established by the legislature in analogous areas, that is a telling sign that the award is disproportionate. Indeed, in some cases that comparison may be sufficient in itself to demonstrate the existence of a constitutional violation. For example, if a corporation found guilty of fraudulent trade practices could be fined a maximum of \$50,000, it would be difficult to justify upholding a jury verdict of \$5,000,000 to punish and deter the identical conduct.⁶ Where such a comparison does not

⁶ Another telltale indication of excessiveness would arise if the verdict under examination were substantially out of line with other awards of punitive damages. *Browning-Ferris*, 109 S. Ct. at 2934 (O'Connor, J., concurring and dissenting); *Solem*, 463 U.S. at 291-292, 298-300. The converse, however, is certainly not true, for the existence of other large punitive verdicts likely reflects nothing more than the predictable results of having punitive damages set by juries exercising unguided and unconstrained discretion. In particular, justifying an award in terms of its relation to only a few of the highest previous awards will lead to an inexorable upward spiral, as more and more large awards are justified by reference

conclusively establish the excessiveness of a sanction, a court should turn to an examination of the proportionality of the penalty to the gravity of the particular conduct being punished.

B. Punitive Damages Are Disproportionate If They Do Not Bear A Reasonable Relationship To The Misconduct For Which Punishment Is Being Imposed.

Another important factor under *Solem* is "the gravity of the offense" for which punishment is being imposed. 463 U.S. at 290-291. From the standpoint of both just retribution and deterrence, a greater wrong should be punished more severely than a lesser wrong. H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 9, 25 (1968); J. Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 179-182 (1892 ed.). This is no less true for punitive civil damages than for criminal fines.

Solem set forth a number of criteria by which the nature of an offense may be measured. See 463 U.S. at 292-294. This Court's due process decisions also provide guidance. See pages 8-9, *supra*. In addition, the common law standards developed in the context of excessiveness challenges to punitive damages awards look to several considerations that may be relevant in determining the gravity of particular conduct. Drawing upon these sources, a punitive damages award can be said to be disproportionate to the conduct for which punishment is being imposed when it lacks any reasonable relation to the character of the defendant's misdeeds, to the injury caused by the defendant's actions, or to the actual or potential gain to the defendant.

This is not to say that each of these considerations will be applicable or of equal weight in every instance; their significance will depend upon the particulars of the given case. Where, however, a punitive damages

to prior large awards, and in turn validate still higher awards in the future.

award appears disproportionate in relation to any of these benchmarks, that is a strong signal that the award does not rationally advance the objectives of imposing punishment and thus is constitutionally infirm.

Furthermore, where the defendant is a corporation, labor union, religious body or other organization whose members or owners consist principally or entirely of persons wholly innocent of the alleged wrongdoing, the courts should be especially sensitive to the potential unfairness of imposing an excessively large punishment upon blameless individuals. Here, for instance, Pacific Mutual is owned by its policyholders, who, of course, had no part in the wrongdoing but will be forced to bear the full brunt of any punishment.⁷

1. Character of the defendant's conduct

In analyzing the character of the defendant's conduct, a reviewing court should first and foremost consider the relative seriousness of the wrongdoing for which the punishment is being imposed. See *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987) (quoting

⁷ In holding that municipalities are not subject to punitive damages in actions under 42 U.S.C. § 1983, this Court observed that "[r]egarding retribution, * * * an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort. * * * Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). "Under ordinary principles of retribution," the Court continued, speaking to a point quite material to this case,

it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the governmental entity itself.

453 U.S. at 267 (citations omitted; emphasis in original).

RESTATEMENT (SECOND) OF TORTS § 908(2)) (the award "must bear some relation to the 'character of the defendant's act'"). There are several commonly accepted yardsticks against which the nature of the defendant's wrongful conduct may be measured. For example, as the Court observed in *Solem*, "nonviolent crimes are less serious than crimes marked by violence or the threat of violence" (463 U.S. at 292-293).

In judging the gravity of the misconduct, the degree of the defendant's culpability is also of central importance. See *Solem*, 463 U.S. at 293-294. A defendant would be highly culpable where, for instance, it violated a fiduciary duty to the plaintiff or otherwise abused a position of trust. Similarly, if a defendant acted with what is commonly called "actual malice"—i.e., with the specific intent or purpose to injure the plaintiff or others—it would have behaved in a highly culpable manner that would support a relatively higher level of punishment. If, on the other hand, a defendant lacked any intent to cause harm but acted in a manner that was later found to have been "reckless" or in "disregard" of the plaintiff's rights, only a lower level of punishment could be justified (assuming that punitive damages would be appropriate at all). While a state may have the constitutional authority to subject reckless or even "grossly" negligent conduct to punishment in the form of punitive damages, principles of fundamental fairness require that the amount of punishment in such a case be commensurate with the lesser degree of culpability.⁸

⁸ Punitive damages are not available unless a defendant is shown to have acted wrongfully. See generally RESTATEMENT (SECOND) OF TORTS § 908(1); 1 J. Ghiardi & J. Kircher, PUNITIVE DAMAGES LAW AND PRACTICE § 5.01 (1985). Thus, proof of the requisite wrongdoing simply establishes that the conduct merits punishment and does not speak to the appropriate size of the punishment. The record would have to show something more, such as a specific intent to cause injury or an extraordinary level of wantonness, in order to justify an especially large verdict.

In addition, where the defendant is a corporation or other organization, its level or extent of culpability depends upon the nature of the organization's complicity in the wrongful conduct. If the conduct was undertaken pursuant to corporate policy or was approved by high-ranking officers, a relatively greater sanction would be permissible, both because the corporation could in such a case fairly be said to be more "culpable" and because higher-level corporate actors have the capacity to commit greater wrongs in the name of the corporation. If, on the other hand, the misconduct was the isolated act of one or two low-level employees, the organization's culpability would be less, and only a relatively smaller sanction would be reasonable.

2. Injury caused by the misconduct

Another red flag indicating excessiveness is the presence of a gross disproportion between the punitive damages award and the injury inflicted by the defendant's conduct. *Solem*, 463 U.S. at 292-293. See also *Life & Casualty Ins. Co. v. McCray*, 291 U.S. 566, 573 (1934) (sustaining penalty for wrongfully withholding payment because the penalty amount bore a "reasonable proportion to the possible actual damages"); *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987). Other things being equal, "[t]he absolute magnitude of the [harm involved] may be relevant" (*Solem*, 463 U.S. at 293).

It by no means follows, however, that proportionality in this factor establishes that a punishment is not exces-

⁹ The extent of the injury inflicted generally is reflected by the amount of compensatory damages. For that reason, common law excessiveness standards identify the amount of compensatory damages as a relevant factor in assessing the propriety of a punitive damages award. See, e.g., *Roulett v. Anheuser-Busch, Inc.*, 832 F.2d at 207 (quoting RESTATEMENT (SECOND) OF TORTS § 908(2)) ("the award * * * must bear some relation to * * * 'the nature and extent of the harm to the plaintiff that the defendant caused'"); see generally K. Redden, PUNITIVE DAMAGES § 3.5(A) (1980 & 1987 Supp.).

sive, especially when the harm to the plaintiff was unintended by the defendant. The primary reason why harm is deemed relevant to the level of punishment of crimes is that society wishes to ensure greater deterrence of more socially injurious acts than of less dangerous ones. But in the context of civil tort actions, that objective is already attained by the fact that the defendant's duty to make compensation will itself vary directly with the extent of the harm caused by his wrongful acts.

Thus, in many circumstances, compensatory damages awards themselves can fully satisfy the goals of punishment and deterrence. See *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 312-313 (1986); *Smith v. Wade*, 461 U.S. at 94 (O'Connor, J., dissenting); Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 IOWA L. REV. 1003, 1060 (1981); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931). Particularly where the compensatory award is sizeable, this element is likely to obviate the need for punitive damages altogether or at least to reduce the amount of such damages that are reasonably necessary to punish and deter.¹⁰

¹⁰ This is especially true where recovery for intangible harm such as mental anguish or pain and suffering is a substantial component of the compensatory award. Such damages often are so large—and so far in excess of the defendant's gain—that they fully satisfy the purposes of punishment. It is well recognized that damages for pain and suffering—which “frequently constitute[] the largest portion of awards”—are inherently “indeterminate” and thus are “left to the discretion of the trier of fact”: because the measurement of such damages is “essentially subjective” and “elusive,” awards for pain and suffering are “open-ended to the point of inviting abuse” and are determined in the “virtually untrammelled discretion” of the jury. 1 M. Minzer, *et al.*, DAMAGES IN TORT ACTIONS 4-6, 4-10, 4-198, 4-205, 4-209 (1989). See also, *e.g.*, C. McCormick, HANDBOOK ON THE LAW OF DAMAGES 318-319 (1935) (damages for pain and suffering represent “an arbitrary allowance” for which the jury is given “no standard to go by”; the principal restraint on such awards is simply the “common sense of the jury”).

Accordingly, the size of the compensatory damages award, while not irrelevant, is but one factor for a court to consider in determining whether the amount of punitive damages is so large as to offend the Due Process Clause. Although some commentators have proposed that punitive damages be considered presumptively excessive if greater than a prescribed multiple (typically three) of the amount of compensatory damages,¹¹ a punitive damages award should neither be conclusively unconstitutional simply because it is more than three times the compensatory award¹² nor conclusively constitutional because it is less than a trebled compensatory award. In the absence of legislative reform, arbitrariness and irrationality can be rooted out of the present punitive damages system only if this Court establishes a due process standard that eschews fixed formulas and instead requires a case-specific analysis of the rationality of the jury's verdict.

3. Actual or potential gain to the defendant

Much like the harm to the plaintiff, the punishment inflicted by a punitive damages verdict may be so far out of line with the amount that the defendant gained or reasonably could have expected to gain from its misconduct as to suggest irrationality. See *Busher*, 817 F.2d

¹¹ See, *e.g.*, American College of Trial Lawyers, REPORT ON PUNITIVE DAMAGES 15 (1989); ABA Special Comm. on Punitive Damages, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 6-10 to 6-12 (1986).

¹² Where the injury caused is slight or only nominal, basing the penalty on the amount of compensatory damages may be inadequate to provide appropriate punishment and deterrence. This Court recognized as much in *St. Louis, I.M. & S. Ry. v. Williams*, *supra*. There the penalty imposed pursuant to statute (\$75 for a \$.66 overcharge) was held not to be excessive because no individual passenger would have an incentive to sue for such nominal actual damages (this was before the advent of class actions) and because the railroad could wrongfully obtain substantial profit from “the numberless opportunities for committing the offense” (251 U.S. at 67). See also *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907).

at 1415; *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073, 1080-1081 (Ariz.), cert. denied, 484 U.S. 874 (1987); Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 874-875 (1989); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1319 (1976). In such an instance, it would be exceedingly difficult to justify the amount of punitive damages as necessary or appropriate to achieve adequate punishment. Bentham, at 179-181; Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1179 & n.69 (1989).¹³

III. THE PUNITIVE DAMAGES AWARD IN THIS CASE IS PLAINLY EXCESSIVE

Application of the *Solem* framework to this case makes it evident that the punitive verdict is grossly excessive

¹³ Evidence of Pacific Mutual's "wealth" was not submitted to the jury or relied upon by the Alabama courts to justify its punishment and therefore does not appear to be an element of this case. In general, the role of wealth in the excessiveness inquiry must be limited if punitive damages awards are to be kept within reasonable bounds. Punitive damages are awarded to deter and punish particular misconduct, and the Constitution therefore dictates that the defendant's conduct be central to the selection of punishment. To allow conduct-based limitations to be overridden by consideration of the defendant's finances would be irrational. The penalty would not "fit the crime," but instead would punish a large entity simply for its status, even though such status in itself is not wrongful. *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273-274 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); cf. *Robinson v. California*, 370 U.S. 660 (1962). For these reasons, and because in the case of organizations charged with economic wrongdoing size has little rational nexus to effective deterrence, the great weight of scholarly commentary opposes giving size or wealth a major role in determining the size of punishment. See, e.g., Cooter, 40 ALA. L. REV. at 1176-1177; Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 950-952 (1989); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 61-63 (1982).

and cannot be justified as a rational means of deterring or punishing the wrongful conduct found to have occurred.

To begin with, the jury's determination of the size of the punishment is not entitled to any appreciable deference. The amount of the verdict was not chosen by the jury from a legislatively established spectrum of permissible penalties for the kind of wrong Pacific Mutual was found to have committed. Rather, the jury was told no more than that "in fixing the amount [of punitive damages], you must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs." RT 897-898. Because the punitive damages award thus represents the view of only a single jury, with no experience of any kind in selecting punishments, and exercising unlimited and basically unguided discretion regarding the appropriate sanction, deferential review is not appropriate. See pages 11-12, *supra*.

A. The Award Is Grossly Disproportionate To Statutory Penalties In Alabama And Other Jurisdictions.

As noted above, the first step in assessing the rationality of a punitive damages award is to compare the amount of the award with criminal fines and civil penalties. Those legislatively established sanctions are fixed with reference to the same goals of deterrence and punishment that underlie punitive damages and therefore provide an objective standard for the proportionality review.

We have canvassed all the criminal fines and civil penalties prescribed by the Alabama legislature. None comes close to the penalty imposed by the jury in this case. Of greatest significance, the statutory penalties most directly applicable to Ruffin's conduct—embezzlement, theft, larceny, and willful violations of the State insurance code—are limited to \$10,000. See Ala. Code §§ 13A-5-11, 13A-5-12(a)(1), 27-1-12, 27-12-17, 27-12-23.

The amounts of Alabama's other monetary punishments range from \$10 for relatively minor conduct¹⁴ to \$50,000 for more serious wrongs.¹⁵ The \$1 million penalty in this case is far outside that range.

It is especially noteworthy that, in fixing this range of penalties, the Alabama legislature has distinguished for purposes of punishment between individuals and organizations such as corporations, which cannot be imprisoned but can only be fined. Thus, in a variety of circumstances—including insurance offenses—Alabama's penal code provides more severe fines for corporations, typically prescribing a multiple of the maximum fine for individuals.¹⁶ But even after taking these differences into account, the fine levels are far below the punishment imposed by the jury here.

The verdict is equally excessive when viewed against the statutory penalties for similar misconduct in other jurisdictions. For example, the highest penalties authorized by other states for willful violations of insurance regulations, embezzlement, larceny, and theft generally

¹⁴ *E.g.*, Ala. Code § 6-6-9 (\$10; failure of summoned witness to attend an arbitration without a sufficient excuse); Ala. Code § 13A-12-3 (\$10-\$50; selling cigarettes to minors); Ala. Code § 14-6-21 (\$10-\$100; person having custody of a jail allowing the jail to become "foul or unclean"); Ala. Code § 22-9-78 (\$5-\$25; midwife's failure to report a death); Ala. Code § 34-23-52 (\$10; late payment of pharmacists' license fee).

¹⁵ *E.g.*, Ala. Code § 8-19-11 (up to \$25,000; violation of a deceptive trade practice order); Ala. Code § 22-22A-5 (\$100-\$25,000; violation of environmental regulations); Ala. Code § 22-30-19 (\$50,000; violation of hazardous waste regulations); see also Ala. Code § 5-5A-10 (\$1,000-\$10,000 per day; engaging in banking without a permit); Ala. Code § 5-20-7 (up to \$10,000 per day; failure of credit card company to comply with cease and desist order).

¹⁶ Ala. Code § 27-29-10 (insurer subject to a fine of up to \$10,000 for violation; individual subject to a fine of up to \$1,000 for same conduct); Ala. Code § 34-7-25 (corporation subject to a \$500 fine for practicing cosmetology without a license; individual subject to a \$100 fine).

range from \$10,000 to \$100,000, with some states providing an alternative fine of two or three times the defendant's gain.¹⁷ The verdict is thus grossly in excess of the punishment level that legislatures have deemed appropriate for misconduct of the type present in this case. Accordingly, this factor alone establishes the impropriety of the jury's award.¹⁸

At a minimum, the disparity suggests that the punitive damages award is presumptively excessive. That conclusion is confirmed by an examination of the relationship between that penalty and the wrongful conduct.

B. The \$1,000,000 Penalty Bears No Reasonable Relationship To The Gravity Of The Conduct Being Punished.

As a preliminary matter, any assessment of the rationality of the punishment in this case requires a careful and precise identification of the conduct being punished and of the rationale for imposing punishment on Pacific Mutual. A proper analysis of that question reveals that there is no acceptable basis for punishing Pacific Mutual; even if there were, any imaginable rationale for doing so cannot support the massive punishment imposed.

1. The Alabama courts did not identify the basis on which the jury was permitted to punish Pacific Mutual.

¹⁷ Only Arizona authorizes higher sanctions—fines of up to \$150,000 for individuals (see Ariz. Rev. Stat. § 13-801) and \$1 million for corporations (see Ariz. Rev. Stat. § 13-803). However, these maxima, which are fixed by general sentencing provisions applicable to a wide variety of offenses, reflect the legislature's judgment regarding the appropriate sanction for the most severe felonies. They therefore provide no basis for upholding the punishment in this case, which surely did not involve misconduct at the upper limits of wrongfulness.

¹⁸ No different conclusion is supported by examination of other punitive damages awards in Alabama, which, as petitioner has demonstrated (see Pet. Reply Br. App. E1-E10), range over a large scale. For the reasons we already have discussed (see note 6, *supra*), such awards do not establish a rational yardstick against which to measure the punishment in this case.

In fact, the Alabama Supreme Court, having once concluded that the sale of health insurance policies to plaintiffs was done within the scope of Lemmie Ruffin's apparent authority (see Pet. App. B7-B10), never separately addressed whether this asserted basis for civil *compensatory* liability sufficed for the quite distinct task of determining susceptibility to *punishment*. In fact, the two questions are worlds apart. When the faithless Ruffin, acting as an intermediary between Pacific Mutual and Union Fidelity on the one hand and plaintiffs on the other, purloined the insurance premiums, someone would have to bear the resulting loss. The principles invoked by the court below may serve to explain why, as between two innocent parties, that loss should be borne by Pacific Mutual as Ruffin's employer. But it is surely a far different question whether an innocent party may properly be punished. The Alabama Supreme Court simply assumed an affirmative answer to that question by conflating the conceptually distinct punitive and compensatory inquiries and conducting only the latter. See 1 & 2 J. Ghiardi & J. Kircher, PUNITIVE DAMAGES LAW AND PRACTICE §§ 2.04, 24.07 (1985); Cooter, 40 ALA. L. REV. at 1181-1182; see also Huber, *No-Fault Punishment*, 40 ALA. L. REV. 1037, 1044 (1989) ("a sweeping new notion of vicarious punishment [has developed, for a]s recently as 1967, the general rule was that an employer would not face punitive damages for the unsanctioned misconduct of an employee").

The analysis of the issue of punishability has been further confused by the failure to distinguish between the acts that were taken by Ruffin in furtherance of his agency relationship with Union Fidelity and Pacific Mutual (the sale of insurance policies and receipt of the premiums) and the wrongful acts for which punishment could constitutionally be imposed (the theft of the premium payments). The sale of the policies was within the scope of Ruffin's employment, but not punishable because not wrongful. The theft of the premiums, on the other hand, while certainly wrongful and punishable, cannot

rationally be said to have been in the course of or within the scope of Ruffin's employment with Union Fidelity and Pacific Mutual; rather, his self-enrichment by diverting to personal use funds paid to his employer was surely a frolic and detour of his own.¹⁹

Properly understood, therefore, Pacific Mutual has been punished for being the *victim* of wrongful acts. (It was a victim because Ruffin's theft exposed it to liability under the policies while depriving it of the premium payments that would cover the insurance risk.) We cannot believe that the Constitution permits the punishment of defendants because of crimes directed at least in part *against* them, and from which they derive no benefit.

2. Assuming for present purposes that we are wrong about the constitutional limits on the State's power to inflict punishment in a case such as this, it remains necessary in considering the rationality of the punishment to identify the actor and the conduct that properly are the focus of the proportionality analysis. Pacific Mutual's punishment could not have been and was not imposed here on the basis of any direct role by the company in the wrongdoing, because the company had none: Ruffin did not act pursuant to some company-wide policy, or with the consent of management, or even in furtherance of any interest of the company.²⁰

¹⁹ This case is thus different, for purposes of vicarious liability, from one in which an insurance agent commits fraud in the course of selling a policy. In the latter situation, even though the fraud may not have been authorized and may have violated his employer's policies, there is at least a sense in which the agent can be said to be acting as the corporation in committing the wrongful acts. For reasons that space does not permit us to explore here, we do not believe that punishment of the corporation is constitutionally permissible solely on the basis of vicarious liability even in such circumstances. But that is a question the Court need not address in this case, because Ruffin's wrongful acts cannot in any sense rationally be said to have been the imputable acts of his employer.

²⁰ Respondents argued in their brief in opposition (at 4) that "Pacific Mutual's corporate responsibility was premised on *corporate malfeasance*" (emphasis in original), because the Birmingham office

This leads to two possible ways of looking at the case. Under one view, the company's vicarious liability for punishment forces it to stand in Ruffin's shoes and accept any punishment that could rationally have been imposed on Ruffin for his individual wrongdoing. Under another, Pacific Mutual is being punished for "corporate wrongdoing" occurring at the sales agent level. From either perspective, however, the punishment of approximately \$1,000,000 cannot be justified in the circumstances of this case.²¹

Viewing Ruffin as the subject of punishment, we readily acknowledge that the misconduct (embezzlement of the insurance premiums), though not violent, is of some gravity. But the loss inflicted on respondent Haslip—\$4,000 in out-of-pocket expenses and some amount, perhaps approaching \$40,000, for nonmonetary injuries²²—is slight

manager allegedly had notice of Ruffin's wrongful conduct. But if the office manager countenanced Ruffin's fraud, he was certainly not acting on behalf of or in the interests of the company. See Pet. Reply Br. 3-4. And, to the extent Pacific Mutual had notice of Ruffin's acts (but see *id.* at 1-4), that evidence is not relevant. The jury was not asked to punish Pacific Mutual for failing to supervise Ruffin (an act that would, at most, amount to ordinary negligence and therefore provide no basis for imposition of punitive damages). Rather, the punishment plainly was inflicted for Ruffin's diversion of the premium payments.

²¹ The judgment in this case does not specify the portion of respondents' recovery that constitutes punishment rather than compensation. See Pet. App. B3. Nevertheless, as petitioner has discussed (Pet. Reply Br. 5-6 & n.3), the record makes clear that the great bulk of the \$1,040,000 awarded to respondent Haslip must have been intended as punitive damages. Indeed, respondents themselves repeatedly characterized the punitive award in the court below as greater than \$1,000,000 Ala. Sup. Ct. Br. 58, 62. Because the Alabama courts did not clarify the precise amount of the punishment and upheld a punitive damages award that may be (and in fact appears to be) some \$1,000,000, analysis of the constitutional issues in this Court should proceed on the premise that such damages constitute the overwhelming share of the jury's verdict.

²² If, as respondents have stated (see note 21, *supra*), approximately \$1 million of the award is punitive, the remainder of the award—\$40,000—must be compensatory.

in relation to the size of the punitive award and cannot rationally explain it. So too for Ruffin's gain, which was but a tiny fraction of the punishment exacted.

No different conclusion can be reached when considering the purposes of punishment. From the standpoint of just retribution, the penalty is wildly disproportionate. The same is true for the goal of rational deterrence. A fine of \$1,000,000 far exceeds any amount that could possibly be necessary and appropriate to deter Ruffin and others like him from similar wrongdoing in the future. Indeed, because the penalty is to be exacted from Pacific Mutual, with which Ruffin could have no hope of a continuing relationship, the size of the penalty is bound to be entirely immaterial to Ruffin and therefore entirely incapable of achieving deterrence. In sum, if Pacific Mutual is being made to stand in the shoes of Lemmie Ruffin for purposes of punishment, the verdict is egregiously excessive.

Precisely the same conclusion follows if the punishment is viewed as being inflicted for corporate wrongdoing. In contrast to Ruffin himself, the character of the company's conduct involves no conscious or deliberate wrongdoing of any kind. And the punitive award remains just as disproportionate to respondents' loss when viewed from this perspective. Moreover, the element of gain to the "offender" vanishes entirely. Even if the company could have avoided any liability to respondents, the diversion of the insurance premiums from Union Fidelity and Pacific Mutual to Ruffin would have gained it not one cent; as matters eventuated, Pacific Mutual was (quite apart from punishment) left with the responsibility of providing health insurance but without the benefit of the corresponding premium income.

Nor, for a variety of reasons, does a deterrence rationale better support a large award against Pacific Mutual than it would against Ruffin himself. First, although the company itself is a large entity, the responsibility

for any misconduct is limited to the lowest level of the company. It would plainly be irrational to treat fraud or theft by Ruffin as equivalent to similar conduct undertaken or authorized at higher levels of the company; Ruffin simply lacked the capacity to engage in corporate wrongdoing of the same scope as those with greater authority. By the same token, the company is bound to be less resistant to disciplining an employee such as Ruffin than a high-ranking officer and therefore will be deterred by a far lower penalty from countenancing misconduct by one at Ruffin's level in the corporate hierarchy. Furthermore, because the scheme for which Pacific Mutual is being held responsible was bound to be discovered when one of the respondents incurred medical expenses and could result only in losses to the company, a purely nominal fine will satisfy fully any need to deter future "misconduct" of this sort.

Because anything beyond a relatively modest monetary sanction far exceeds what is justifiable to punish and deter the type of conduct in question here, the award against Pacific Mutual is constitutionally excessive and must be set aside.

C. Alabama's Post-Verdict Review Procedures Do Not Eliminate The Unconstitutionality Of The Punitive Award In This Case.

Respondents contend (Br. in Opp. 14-16) that the state-law review of the size of the punitive damages award conducted by the courts below assured satisfaction of any proportionality inquiry mandated by the Due Process Clause. That is simply incorrect. The Alabama courts did not even purport to conduct the kind of proportionality review required by the Due Process Clause.²³ The trial court made only the conclusory finding that the award was "not excessive as a matter of law," even

²³ Of course, even if they had, an erroneous conclusion that the sanction was not arbitrary would not insulate the award from review by this Court.

though it was "for a great amount of money" and the court "would in all likelihood have rendered a less[er] amount." Pet. App. A15. And the Alabama Supreme Court observed merely that "jury verdicts are presumed correct, and that presumption is strengthened when the presiding judge refuses to grant a new trial." *Id.* at B13.²⁴ Such perfunctory review in the course of upholding the punishment under state law does not preclude scrutiny of the jury's exorbitant award under the federal Constitution.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted.

ANDREW L. FREY

Counsel of Record

KENNETH S. GELLER

MARK I. LEVY

ANDREW J. PINCUS

Mayer, Brown & Platt

2000 Pennsylvania Ave., N.W.

Washington, D.C. 20006

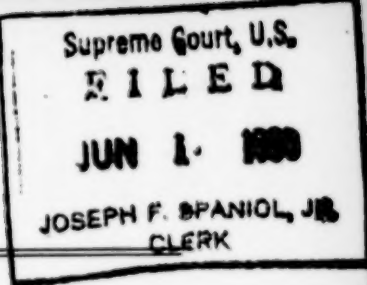
(202) 778-0602

Counsel For Amici Curiae

JUNE 1990

²⁴ The very language of these decisions undercuts respondents' assertion (Br. in Opp. 12) that the verdict was subjected to *de novo* review.

24
No. 89-1279



In The
Supreme Court of the United States
October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
vs.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,
Respondents.

On Writ Of Certiorari To The
Supreme Court Of Alabama

BRIEF OF THE ASSOCIATION FOR
CALIFORNIA TORT REFORM AS AMICUS
CURIAE IN SUPPORT OF PETITIONER

FRED J. HIESTAND
1121 L Street
Suite 100
Sacramento, California
95814
(916) 448-5100

ELLIS J. HORVITZ
*S. THOMAS TODD
HORVITZ & LEVY
15760 Ventura Boulevard
18th Floor
Encino, California 91436
(818) 995-0800

Attorneys for
The Association for California Tort Reform
*Counsel of Record

TABLE OF CONTENTS

	Page
Table Of Authorities.....	iii
Interest Of Amicus Curiae.....	1
Summary Of Argument.....	1
Argument.....	2
I. In Most States, Punitive Damages Are Private Fines Without Statutorily-Defined Limits	2
II. California Juries Routinely Render Large Puni- tive Damage Awards	3
III. California Trial Judges Grant New Trial Motions Or Remit Punitive Damage Verdicts In A High Percentage Of Cases	6
IV. Like Most States, California Has No Meaningful Standards To Guide A Jury In Determining The Amount Of A Punitive Award	8
A. California Juries Are Told To Consider Three Factors: (1) The Reprehensibility Of The Defendant's Conduct, (2) The Defen- dant's Financial Condition, And (3) The Ac- tual Damage Suffered By The Plaintiff	8
B. "Reprehensibility" Provides No Meaningful Guidance To A Jury.....	10
C. The Defendant's Financial Condition Provides No Guidance In Those Cases Where A Well- Defined Standard Is Needed The Most	10
D. A Defendant's Financial Condition Is An Irrelevant, If Not Unconstitutional, Consid- eration In Determining The Amount Of A Penalty.....	12

TABLE OF CONTENTS - Continued

	Page
E. Consideration Of The Actual Damages Suffered By The Plaintiff Has Not Proven To Be A Meaningful Criterion	13
V. California's Unfortunate Experience Points The Way For The Rest Of The Nation	15
VI. The Time Has Come To Invoke Due Process To Force State Legislatures To Do Their Job	17
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES

Betts v. Allstate Ins. Co., 154 Cal.App.3d 688, 201 Cal.Rptr. 528 (1984).....	14
Carr v. Progressive Casualty Ins. Co., 152 Cal.App.3d 881, 199 Cal.Rptr. 835 (1984).....	13
Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., 155 Cal.App.3d 381, 202 Cal.Rptr. 204 (1984).....	15
Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., 189 Cal.App.3d 1072, 234 Cal.Rptr. 835 (1987).....	14
Dumas v. Stocker, 213 Cal.App.3d 1262, 262 Cal.Rptr. 311 (1989).....	10
Fenlon v. Brock, 216 Cal.App.3d 1174, 265 Cal.Rptr. 324 (1989).....	10
Gagnon v. Continental Casualty Co., 211 Cal.App.3d 1598, 260 Cal.Rptr. 305 (1989)....	9, 13, 15
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	2
Giaccio v. Pennsylvania, 382 U.S. 399 (1966).....	10
Goshgarian v. George, 161 Cal.App.3d 1214, 208 Cal.Rptr. 321 (1984).....	11
Grayned v. City of Rockford, 408 U.S. 104 (1972)	17
Hammond v. Gadsden, 493 So.2d 1374 (Ala. 1986)	16
International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979)	2, 13

TABLE OF AUTHORITIES - Continued

	Page
<i>Liodas v. Sahadi</i> , 19 Cal.3d 278, 137 Cal.Rptr. 635, 562 P.2d 316 (1977).....	14
<i>Neal v. Farmers Ins. Exch.</i> , 21 Cal.3d 910, 148 Cal.Rptr. 389, 582 P.2d 980 (1978).....	9
<i>Rosenbloom v. Metromedia, Inc.</i> , 403 U.S. 29 (1971).....	2
<i>Werschkuhl v. United California Bank</i> , 85 Cal.App.3d 981, 149 Cal.Rptr. 829 (1978).....	15
<i>Williams v. Illinois</i> , 399 U.S. 235 (1970)	12

OTHER AUTHORITIES

California Book of Approved Jury Instructions No. 14.71 (1989 Revision).....	9, 15
2 Ghiardi & Kircher, <i>Punitive Damages Law and Practice</i> § 21.01 at 2 (1989).....	3
Dobbs, <i>Handbook on the Law of Remedies</i> (1973) ...	14, 15
Ellis, <i>Fairness and Efficiency in the Law of Punitive Damages</i> , 56 S. Cal. L. Rev. 1 (1982).....	13, 14
Jury Verdicts Weekly, Inc., <i>Jury Verdicts Weekly</i>	3
Morris, <i>Punitive Damages in Tort Cases</i> , 44 Harv. L. Rev. 1173 (1931).....	13
Peterson, Sarma & Shanley, <i>Punitive Damages: Em- pirical Findings</i> (RAND Corp., Institute for Civil Justice, 1987).....	4, 6
Prosser & Keeton, <i>The Law of Torts</i> (5th ed. 1984)	14
Cal. Civ. Code § 3294 (West Supp. 1990).....	5, 8

INTEREST OF AMICUS CURIAE

The Association for California Tort Reform ("ACTR") is dedicated to improving California's civil liability system in terms of fairness, efficiency, economy, uniformity, and certainty. ACTR, which was organized twelve years ago as a non-profit public benefit corporation, is the oldest organization of its kind in the nation and presently has more than one thousand members representing business, the professions, local government, and individual citizens.

Multi-million-dollar punitive damage jury verdicts, verdicts that were rarely heard of as recently as twenty years ago, have become commonplace in California. It also has become commonplace for trial judges to intervene to reduce juries' excessive punitive verdicts. A civil liability system based on trial by jury in which judges grant remittiturs in a high percentage of cases is fundamentally flawed. ACTR's members wish to present their views to the Court concerning the urgent need for constitutional scrutiny of punitive damages.

SUMMARY OF ARGUMENT

We describe the anomaly of punitive damages and the serious problem that has resulted by presenting a study of California punitive damage jury verdicts over the 14-year period from January 1, 1976, through December 31, 1989. The study discloses that seven-figure punitive damage jury verdicts have become routine, and trial judges are finding it necessary to intervene and reduce

such verdicts in an unacceptably high percentage of cases.

We also briefly discuss California law on determining the size of punitive awards, which is similar to the law in most states, including Alabama. It will be readily apparent that existing law gives juries virtually unbridled discretion in setting the amount of punitive awards. This is why verdicts are so often outlandish and why it is necessary for trial judges to intervene with such frequency.

Our conclusion: a defendant has a right to trial by a jury operating under appropriate legal standards. Until state legislatures do their job and set maximum limits for punitive awards and establish meaningful criteria for juries to use, punitive damages are *per se* a violation of due process.

ARGUMENT

I.

IN MOST STATES, PUNITIVE DAMAGES ARE PRIVATE FINES WITHOUT STATUTORILY-DEFINED LIMITS.

Punitive damages serve the same function as criminal penalties and are in effect private fines. *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). Yet, unlike a fine in a criminal case, there is no statutorily-defined maximum for punitive damages in most states.

Until recent years, the failure of state legislatures to set maximum limits for punitive damages and to establish meaningful criteria for juries to use in determining punitive awards received little attention because "punitive damage awards occurred infrequently; their size, when they did occur, was relatively small; and, the cases in which they occurred involved, by and large, some of the most egregious forms of intentional torts." 2 Ghiardi & Kircher, *Punitive Damages Law and Practice* § 21.01 at 2 (1989). Now, however, all this has changed. A punitive monster is growing on the civil side, and it has reached enormous proportions.

II.

CALIFORNIA JURIES ROUTINELY RENDER LARGE PUNITIVE DAMAGE AWARDS.

Appendix A lists the punitive damage jury verdicts for \$100,000 or more rendered by California juries during the 14-year period from January 1, 1976, through December 31, 1989.¹ The following chart summarizes the verdicts in these cases:

¹ The source for the statistics is Jury Verdicts Weekly, Inc., *Jury Verdicts Weekly*, which compiles reports of jury verdicts in all California state and federal courts. *Jury Verdicts Weekly* does not purport to be a complete listing of every verdict in California (it depends on trial attorneys to submit the results of their cases), but it is recognized as an authoritative source of information concerning jury verdicts. The RAND Corporation used *Jury Verdicts Weekly* as the data base for a study of California punitive damage jury verdicts during the period 1980-1984.

(Continued on following page)

Year	No. \$100,000+ Jury Verdicts	Sum of Verdicts
1976	7	\$ 7,525,138
1977	9	\$ 13,656,000
1978	14	\$137,193,000 ²
1979	12	\$ 35,415,815
1980	20	\$ 35,116,500
1981	29	\$ 27,375,710
1982	32	\$ 54,861,096
1983	39	\$109,405,254
1984	68	\$ 59,342,317
1985	77	\$363,100,739 ³
1986	61	\$105,894,292
1987	62	\$202,852,818
1988	29	\$280,427,988 ⁴
1989	48	\$ 80,993,939

(Continued from previous page)

Peterson, Sarma & Shanley, *Punitive Damages: Empirical Findings 4* (RAND Corp., Institute for Civil Justice, 1987) [hereinafter cited as RAND study].

Whenever a jury rendered separate punitive awards against multiple defendants in a single case, we added the awards together.

² One verdict, *Grimshaw v. Ford Motor Co.*, accounts for \$125,000,000 of the total. Without *Grimshaw*, the total is \$12,193,000.

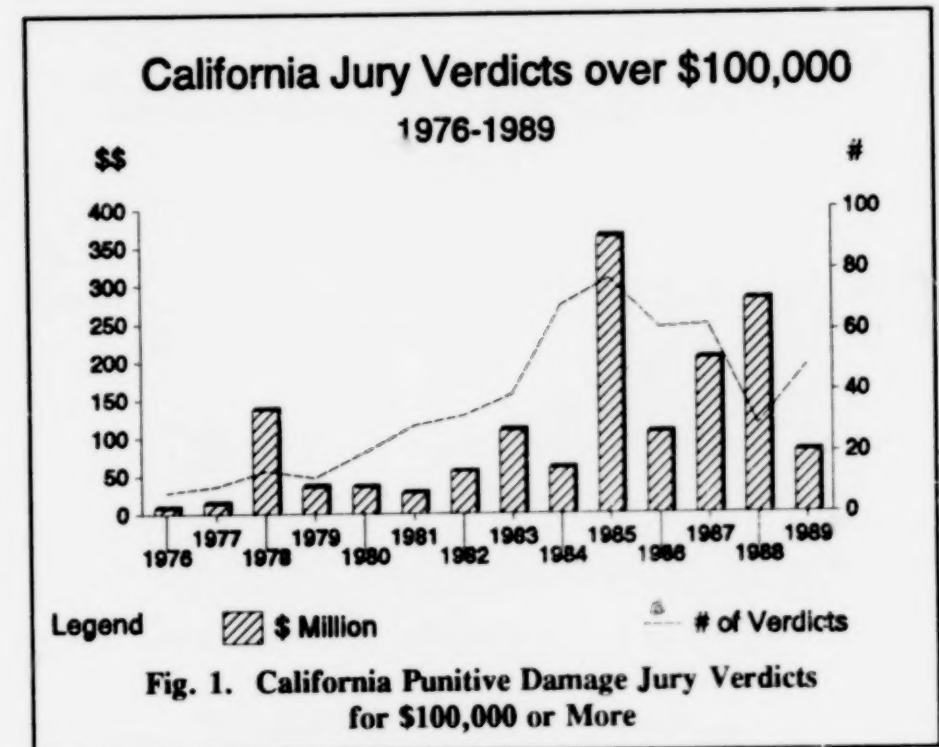
³ One verdict, *Micro/Vest v. Computerland*, accounts for \$125,000,000 of the total. Without *Micro/Vest*, the total is \$238,100,739.

⁴ One verdict, *Baroway v. KMG Main Hurdman*, accounts for \$147,000,000 of the total. Without *Baroway*, the total is \$133,427,988.

(Continued on following page)

These 507 jury verdicts total over \$1.5 billion (\$1,513,160,606)! During this 14-year period in California there were 179 *punitive damage jury verdicts* of \$1 million or more, 54 of them \$5 million or more, and 30 of them \$10 million or more.

Figure 1 below depicts the number and sum of the verdicts for each year of our study.



(Continued from previous page)

Effective January 1, 1988, California's punitive damage statute was amended to require proof by clear and convincing evidence and to better define the circumstances under which punitive damages may be awarded. The amendment applied to all cases tried after its effective date. Cal. Civ. Code § 3294 (West Supp. 1990). It appears to have had an immediate impact on the number, but not the size, of punitive damage verdicts, though a year later, in 1989, the number of verdicts resurged.

Just the most recent 5 years of the 14-year period, 1985-1989, account for 55% of the verdicts (277 out of 507), 68% of the total amount awarded (\$1,033,269,776 out of \$1,513,160,606), 57% of the awards over \$1 million (102 out of 179), 69% of the awards over \$5 million (37 out of 54), and 70% of the awards over \$10 million (21 out of 30).

The RAND Corporation's 1987 study of punitive damages, the data base for which included California punitive damage jury verdicts through 1984,⁵ concluded: "The largest punitive damage awards have increased greatly in size, sharply increasing both the average award and the total dollars awarded." RAND study at ix. The awards depicted in our study for the years following the RAND study, from 1985 through 1989, show this ominous trend continuing.

III.

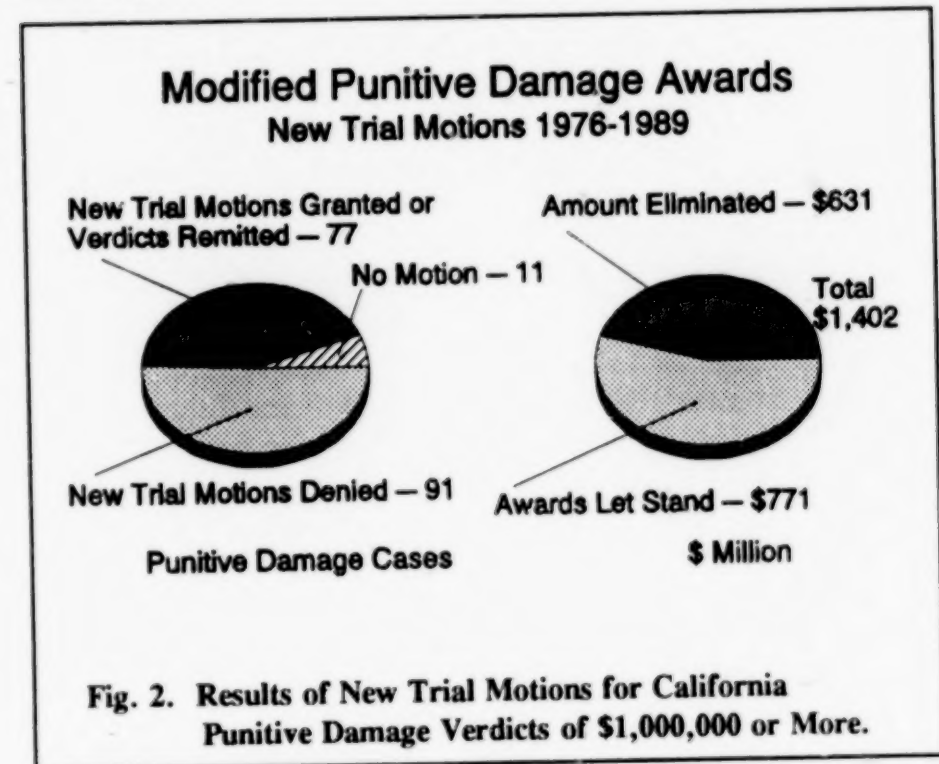
CALIFORNIA TRIAL JUDGES GRANT NEW TRIAL MOTIONS OR REMIT PUNITIVE DAMAGE VERDICTS IN A HIGH PERCENTAGE OF CASES.

The rulings of trial judges on new trial motions confirm that juries' punitive damage verdicts are too often excessive. Appendix B shows the results of the new trial motions in the 179 cases included in Appendix A where the jury's punitive damage verdict was \$1 million or

⁵ The data for the RAND study covered all civil jury trials in Cook County, Illinois, and San Francisco County, California, from 1960 to 1984, and all civil jury trials throughout California from 1980 to 1984. RAND study at v.

more.⁶ In 168 of the 179 cases the trial court ruled on a new trial motion. A new trial was granted or the punitive award was remitted in 77 cases, or 46% of the time. Of the \$1,402,016,994 total awarded by these 179 juries, \$631,233,486, or 45%, was eliminated by the trial judges.

Figure 2 below depicts the results of the new trial motions.



The mere fact that such a large percentage of punitive damages is remitted demonstrates current jury procedures are seriously and fundamentally flawed.

⁶ These 179 cases with punitive damage verdicts of \$1 million or more account for \$1,402,016,994, or 93%, of the \$1,513,160,606 awarded by the juries in the 507 cases included in our study.

What accounts for California's punitive damage mess?

IV.

LIKE MOST STATES, CALIFORNIA HAS NO MEANINGFUL STANDARDS TO GUIDE A JURY IN DETERMINING THE AMOUNT OF A PUNITIVE AWARD.

A. California Juries Are Told To Consider Three Factors: (1) Reprehensibility Of The Defendant's Conduct, (2) The Defendant's Financial Condition, And (3) The Actual Damage Suffered By The Plaintiff.

California Civil Code section 3294, the statutory authorization⁶ for punitive damages, provides in pertinent part:

"(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

The statute goes on to define "malice," "oppression," and "fraud," and to define the circumstances under which an employer may be found liable for punitive damages based on the acts of an employee. What the statute does *not* do is place any limit whatever on the *amount* of a punitive damage award, nor does it specify any standards to govern a jury's determination of the amount of a punitive award.

The California Supreme Court has held that a punitive award is excessive if " 'the entire record, when viewed most favorably to the judgment, indicates [the award was] rendered as the result of passion and prejudice.' " *Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 927, 148 Cal.Rptr. 389, 582 P.2d 980 (1978). The three factors the California Supreme Court says are relevant to this determination, *id.* at 928, have been turned into a jury instruction, California Book of Approved Jury Instructions (BAJI) number 14.71 (1989 Revision). This instruction provides in pertinent part:

"The law provides *no fixed standards* as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

"In arriving at any award of punitive damages, you are to consider the following:

"(1) The *reprehensibility* of the conduct of the defendant.

"(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of *defendant's financial condition*.

"[(3) That the punitive damages must bear a reasonable relation to the injury, harm, or *damage actually suffered by the plaintiff*.]"⁷ (Emphasis added.)

Given the nature of the three factors a jury is told to consider, it is hardly surprising that so many punitive

⁷ The "use note" to this jury instruction explains: "Paragraph number 3 is in brackets and must be given if requested by the defendant. *Gagnon v. Continental Casualty Co.*, 1989, 211 Cal.App.3d 1598, 1605, 260 Cal.Rptr. 305, 309."

damage verdicts have to be remitted on the ground of excessiveness.

B. "Reprehensibility" Provides No Meaningful Guidance To A Jury.

The "reprehensibility" factor tells the jury little of any use. See *Giaccio v. Pennsylvania*, 382 U.S. 399, 404 (1966), where this Court referred to the term "reprehensible conduct" as "loose and unlimiting." The jury already has considered the nature of the defendant's conduct in deciding whether to award punitive damages in the first place. Telling the jury to again consider "[t]he reprehensibility of the conduct of the defendant" in deciding *how much* to award adds little to the equation. This factor is entirely subjective and does not serve to rein in the jury's discretion.

C. The Defendant's Financial Condition Provides No Guidance In Those Cases Where A Well-Defined Standard Is Needed The Most.

The "financial condition of the defendant" factor is somewhat anomalous in that California's appellate courts do not agree on whether the plaintiff is even required to present evidence of the defendant's wealth in order to sustain a punitive award. Compare *Fenlon v. Brock*, 216 Cal.App.3d 1174, 1178-83, 265 Cal.Rptr. 324 (1989) with *Dumas v. Stocker*, 213 Cal.App.3d 1262, 1267-69, 262 Cal.Rptr. 311 (1989). When evidence of wealth is presented, it may provide some guidance in setting an

amount sufficient to punish and deter when the defendant is an individual of normal means or a small business. But it becomes less and less meaningful as wealth increases, to the point of providing no guidance at all when a multi-million- or multi-billion-dollar corporation is involved.

Consider the following hypothetical: an individual with net worth of \$100,000 and an insurance company with net worth of \$1 billion engage in identical tortious conduct causing identical injuries. A jury determines that the imposition of \$10,000 in punitive damages against the individual defendant (10 percent of net worth) is sufficient punishment to have the prescribed deterrent effect. On its face, this may not appear to be unreasonable. See, e.g., *Goshgarian v. George*, 161 Cal.App.3d 1214, 1228, 208 Cal.Rptr. 321 (1984) ("Where the other factors do not militate in favor of reversal, the mere fact that the punitive damages awarded equaled about 10 percent of the tortfeasor's net worth should not itself call for reversal of the damages as excessive."). But does this mean the jury should impose punitive damages of \$100 million against the insurance company (10 percent of its net worth, but 10,000 times more than the fine imposed on the individual) in order to achieve the same deterrent effect? Certainly not. But the jury is not told how the insurance company should be treated differently from the individual defendant. The same, imprecise "financial condition of the defendant" factor is used in every case, even though its application has to vary dramatically depending on the wealth of the particular defendant involved. The vagueness of this factor where large businesses are concerned means it is of little or no use in precisely those cases

where a well-defined standard is needed the most to avoid excessive awards. A look at the names of the defendants in the 507 cases included in our study of punitive damage jury verdicts reveals that most of the verdicts were against businesses.

D. A Defendant's Financial Condition Is An Irrelevant, If Not Unconstitutional, Consideration In Determining The Amount Of A Penalty.

The use of wealth as a criterion for determining the amount of a punitive award assumes that a larger penalty for wealthy defendants is necessary for effective deterrence. But the defendant's wealth is not a factor in the calculus of deterrence. Deterrence theory is based on the plausible assumption that an actor weights the expected costs and benefits of future conduct. The measure of deterrence is the *benefits* to be derived from the conduct – the costs should be set high enough to significantly exceed those benefits. The actor's pre-existing wealth, or lack of it, is irrelevant.

In any event, wealth should not be a constitutionally-permissible criterion for determining punishment. In *Williams v. Illinois*, 399 U.S. 235 (1970), this Court invalidated on equal protection grounds the practice of imprisonment beyond the statutory maximum jail sentence if the defendant is financially unable to pay a fine. Logically, the converse situation, where a penalty is increased if the defendant is wealthy, should be equally repugnant to constitutional guarantees. Punishment should be based on what the defendant did, not on who the defendant is.

The impermissible effect of allowing a jury to consider a defendant's wealth is plain: "[I]t cannot be ignored that punitive damages may be employed to punish unpopular defendants." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. at 50-51 n.14. "It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931). "[T]he biases and inclinations toward wealth redistribution exhibited by triers of fact are permitted to influence decisions on punitive damage issues." Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 53 (1982).

E. Consideration Of The Actual Damages Suffered By The Plaintiff Has Not Proven To Be A Meaningful Criterion.

The criterion that the punitive award must bear a "reasonable relation to the injury, harm, or damage actually suffered by the plaintiff" has proven to be meaningless. California law does not even require that there be an award of actual damages in order to sustain a punitive damage award. E.g., *Gagnon v. Continental Casualty Co.*, 211 Cal.App.3d at 1603 n.5; *Carr v. Progressive Casualty Ins. Co.*, 152 Cal.App.3d 881, 892, 199 Cal.Rptr. 835 (1984). Where actual damages are awarded, the jury has no way of knowing what a "reasonable relation" is in any given case. In other contexts, the use of "reasonable" as a measure is related to the common experience of the jury, e.g., the "reasonable person" standard for negligence. In this setting, however, there is nothing in the common experience of a juror which sheds light on whether one

amount of punitive damages is more reasonably related to actual damages than another. The jury is left to speculate.

Moreover, to say a punitive award must bear a "reasonable relation" to actual damages on the heels of having said the jury should consider the defendant's wealth creates a direct conflict. "[O]ne rule requires the proportioning of the punitive award to the compensation granted, while the other requires the proportioning of the award to the defendant's ability to pay it." Dobbs, *Handbook on the Law of Remedies* 210-11 (1973).

The lack of any meaningful guidance from this factor is borne out by the inconsistent manner in which California appellate courts use it to determine whether an award of punitive damages is excessive. In almost every appellate opinion discussing this factor it is emphasized that there is "no fixed ratio" between the award of punitive and compensatory damages. *E.g.*, *Liodas v. Sahadi*, 19 Cal.3d 278, 284, 137 Cal.Rptr. 635, 562 P.2d 316 (1977); *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal.App.3d 1072, 1097, 234 Cal.Rptr. 835 (1987), cert. denied, 486 U.S. 1036 (1988); *Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 711-12, 201 Cal.Rptr. 528 (1984). In other words, if the appellate court believes the jury's punitive award is warranted by the facts it will affirm, and if not it will reverse, regardless of the ratio of punitive to compensatory damages. *See* Prosser & Keeton, *The Law of Torts* 14-15 (5th ed. 1984); Dobbs, *supra*, at 211; Ellis, *supra*, at 60. We will spare this Court a recitation of the ratio of compensatory to punitive damages in each of the numerous California appellate decisions affirming or reversing punitive awards. Suffice it to say we can find a case

affirming and a case reversing for just about every ratio category. *See, e.g.*, *Gagnon v. Continental Casualty Co.*, 211 Cal.App.3d at 1604 ("[A] ratio of 32.7 to 1 has been found unreasonable . . . while ratios of 190.5 to 1 . . . and even 2,000 to 1 . . . have been found reasonable."); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 390, 393-96, 202 Cal.Rptr. 204 (1984); *Werschull v. United California Bank*, 85 Cal.App.3d 981, 149 Cal.Rptr. 829 (1978) (affirming \$550,000 punitive award where compensatory award was \$1).

Absent a fixed ratio, the "reasonable relation" factor is purely subjective and of no use to a jury in determining what is proportionate in any given case. It adds no precision whatever to the process of determining the appropriate amount of a punitive damage award. *See* Dobbs, *supra*, at 211 ("Since no precise ratio is ever required, the rule is really not a rule at all, but only a general idea. It encourages an inflexible posture without adding any commensurate certainty in the law. It probably doesn't do much harm, but it is difficult to see that it does any good at all.").

V.

CALIFORNIA'S UNFORTUNATE EXPERIENCE POINTS THE WAY FOR THE REST OF THE NATION.

It is undeniable that California's "no fixed standards" standard in BAJI No. 14.71, with its three meaningless factors, permits a jury to determine the amount of a punitive award without essential guidance. This lack of

guidance renders punitive damage verdicts wholly unpredictable and explains the incredible amounts California juries are awarding.

The three factors California juries are told to consider are used in other states, including Alabama. See *Hammond v. Gadsden*, 493 So.2d 1374 (Ala. 1986). However, in Alabama the jury is instructed only on the "reprehensibility" factor.⁸ The "financial condition" and "reasonable relation to actual damages" factors, along with several others, are for the trial judge to use in reviewing the jury's damage verdict for excessiveness. It strikes us as rather strange that the Alabama Supreme Court would recognize a need to rein in jury discretion concerning punitive damages, but would seek to do so only by means of new trial motions and appellate review rather than by an appropriate jury instruction in the first instance. Whatever happened to the defendant's right to trial *by jury* where punitive damages are concerned? In any event, California's experience demonstrates that instructing the jury on factors such as "financial condition" and "reasonable relation to actual damages" does no good anyway. The factors are so subjective that they do not significantly improve upon Alabama's simple instruction, which effectively tells the jury to pick any number it likes.

One is hard pressed to devise a penalty more vague and destructive than California's, Alabama's, and most

⁸ In *Haslip* the jury was told: "Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs." RT 898.

states' punitive damage laws. We are confident this Court would not countenance laws imposing limitless fines. Neither should it countenance limitless punitive damage laws under which juries are rendering such incredible verdicts.

VI.

THE TIME HAS COME TO INVOKE DUE PROCESS TO FORCE STATE LEGISLATURES TO DO THEIR JOB.

At the very least, due process should require state legislatures to set the outer limit for punitive damages. A certain degree of risk of arbitrary and discriminatory enforcement is inherent in every penalty. It is the legislature's job to make the basic policy decision where that risk should end by setting a maximum. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to . . . judges . . . and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."). Most state legislatures have not done their job where punitive damages are concerned. Until they do, until the maximum amount of a punitive damage award is delimited by statute, and until specific criteria for determining the amount of a punitive award within the statutory limit are prescribed, punitive damages should be deemed *per se* a violation of due process of law.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed with direction to strike the punitive damage award.

Dated: June 1, 1990.

Respectfully submitted,

FRED J. HIESTAND

ELLIS J. HORVITZ

S. THOMAS TODD

HORVITZ & LEVY

*Counsel for Amicus Curiae
Association for California
Tort Reform*

APPENDIX A

1976

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount^a</u>	<u>Case Name</u>	Jury Verdicts Weekly <u>Voi./No./Pg.</u>
\$5,300,000	Austero v. Washington National Insurance Co.	20/30/38
935,000	Eichar v. Surety Life Insurance Co.	20/15/35
511,138	Runnels v. Astra Pharmaceut	20/32/12
379,000	Fleckner-Palmtag Realty v. Kaufman	21/3/9
175,000	Townhouse Gardens v. Reliance Capital Corp.	20/19/32
125,000	U.S. Cablevision v. Microwave Engineering, Inc.	20/14/21
100,000	Richardson v. Handy Pantry Food Stores	20/47/18

A2

1977

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$10,000,000	Rosener v. Sears, Roebuck & Co.	21/5/2
2,000,000	Von Brimer v. Whirlpool Corp.	22/4/11
336,000	Austero v. National Casualty of Detroit	21/10/38
275,000	Sinclair v. Flo-Kem Products	21/31/19
250,000	Anderson v. Weisman	21/15/15
250,000	Lemer v. Boise Cascade	21/19/1
220,000	Ginsburg v. Ginsburg	21/39/6
175,000	Parks v. Marine Office of America	21/21/37
150,000	Miller v. Elite Insurance Co.	21/16/6

A3

1978

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$125,000,000	Grimshaw v. Ford Motor Co.	22/14/26
4,000,000	Hasson v. Ford Motor Co.	22/45/23
1,750,000	Pawlaczyk v. American Hospital Supply Co.	22/36/18
1,500,000	Mardor v. Richards Manufacturing Co.	22/29/19
1,075,000	Jones v. Bank of America	22/52/4
1,000,000	Bialak v. Montgomery Ward Co.	22/51/14
663,000	Veterinary Pathology v. Revlon, Inc.	22/43/24
500,000	Davis v. Environmental Power Ltd.	22/31/22
500,000	Dickinson v. Vorelco of Cal., Inc.	22/24/4
500,000	J. Blazona Constr., Inc. v. Evert	22/48/6
250,000	Stranlund v. Safeco Title Insurance Co.	22/46/21
165,000	Davis v. Blue Cross of Northern California, Inc.	22/42/3
150,000	Chevalier v. Dubin	22/26/20
140,000	Aikey v. Vletas	22/16/20

A4

1979

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$17,750,003	Harmsen v. Smith	24/5/23
11,058,810	Seaman's Direct Buying Service v. Standard Oil Co. of Cal.	23/51/1
1,500,001	Kanins v. American Hawaiian Steamship Co.	24/2/29
1,310,000	Helderman v. Int'l Brotherh'd of Elec. Wrkrs.	23/17/3
1,000,000	MPB Associates v. United California Bank	23/46/6
900,000	Parnell v. Continental Casualty Co.	23/40/7
872,001	Ingram v. Commercial Bankers	23/32/22
350,000	Smith v. La Vista Cemetery Assn.	24/5/22
315,000	Gilmore v. International Finance and Trade Development Corp.	23/36/27
150,000	Alhino v. Western Title Guaranty Co.	23/8/1
110,000	Fitzgerald v. Advanced Health Systems, Inc.	23/38/28
100,000	Laurens v. Republic Nat'l Life Insurance Co.	23/39/17

A5

1980

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$9,900,000	Union Bank v. Fireman's Fund Ins. Co.	24/25/27
6,510,000	Golf West of Kentucky, Inc. v. Life Investors, Inc.	24/33/22
4,500,000	Norman v. Colonial Penn Franklin Life Ins. Co.	24/52/19
3,000,000	Sanders Farms, Inc. v. Griffin	24/43/18
2,200,000	C.C. Davis & Co. v Alioto	24/28/2
1,500,000	Wayte v. Rollins International, Inc.	25/8/12
1,350,000	Uhlmann Offices, Inc. v. City National Bank	24/51/13
1,000,000	Glover v. Allstate Insurance Co.	25/2/19
1,000,000	Pistorius v. Prudential Insurance Co.	24/17/3
750,000	Noronha v. Blue Cross of No. California	24/20/6
560,000	Rosen v. Sneed	24/48/16
525,000	Diaz v. Tribune Publishing Co.	24/8/3
400,000	Cohen v. Fitzsimmons	24/17/4
350,500	Jones v. Allstate Insurance Co.	24/26/40
346,000	Ambrose v. Scott	24/48/3
300,000	Oberg v. A-S Development, Inc.	24/30/12
275,000	Price v. Cavanaugh	25/3/17

A6

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
250,000	M.V. Golden Pacific v. San Diego Marine Constr.	24/12/25
200,000	Austero v. Washington National Insurance Co.	24/21/24
200,000	Chodos v. Insurance Co. of North America	24/26/30

A7

1981

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$3,117,946	Spieker v. Senator Hotel Associates	26/5/8
3,000,000	Betts v. Allstate Insurance Co.	25/48/17
2,500,000	Moore v. American United Life Insurance Co.	26/15/13
2,073,559	The Glovatorium, Inc. v. Nat'l Cash Register	25/25/4
2,000,000	Aceto v. Certified Life Insurance Co. of Cal.	25/27/10
2,000,000	California Shoppers, Inc. v. Royal Globe Insurance Co.	25/38/15
2,000,000	Smithers v. Metro- Goldwyn-Mayer, Inc.	25/46/24
1,500,000	Hinton v. Venture Out in America, Inc.	25/13/8
1,500,000	Marino v. Synanon Church	25/43/7
1,300,000	Burnett v. National Enquirer, Inc.	25/25/23
750,000	McKibben v. Connecticut Indemnity Co.	26/9/9
750,000	Ziglar v. Noble	25/52/19
700,000	Roland v. Al Sabah	25/48/2
584,045	Baker v. Kemper Insurance Co.	25/10/34
558,160	Paulfrey v. Blue Chip Stamps Co.	25/46/31

A8

Amount	Case Name	Jury Verdicts Weekly
		Vol./No./Pg.
500,000	Bananejad v. Habish Int'l, Inc.	25/48/5
500,000	Mosby v. Duffin	25/28/6
260,000	Palmer v. Smith's Food King Market	26/5/16
250,000	Hapip v. Texas Renaissance Festival, Inc.	25/26/5
200,000	Ray v. Bank of America	26/5/4
200,000	Rulon-Miller v. IBM Corp.	26/11/1
200,000	Schlager v. Homel	25/29/19
200,000	Songer v. Bordan	25/39/3
166,000	Kennedy v. Pier 1 Imports	26/2/6
150,000	Insurors of California v. DeMarco, Barger, Beral & Pierno	25/21/17
116,000	Fleming v. Safeco Insurance Co. of America	26/5/19
100,000	Badagliacia v. Millennium	25/24/12
100,000	Waite V. Wasserman	25/38/7
100,000	Young v. Personal Service Insurance Co.	25/30/16

A9

1982

Punitive Damage Jury Verdicts
\$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly
		Vol./No./Pg.
\$17,500,000	The P.K.L. Companies v. The Eaton Corp.	26/28/23
10,000,000	West v. Johnson & Johnson Products, Inc.	27/13/8
4,500,000	Norton v. Kaiser Steel Corp.	26/51/30
3,000,000	Pitzer v. Security Pacific National Bank	26/18/27
2,500,000	Pollard v. National Life & Accident Co.	26/50/26
2,250,000	Beltz Travel Service, Inc. v. Trans World Airlines	26/15/4
2,000,000	Boles v. Travelers Indemnity Co.	27/17/5
1,500,000	Travelers Insurance Co. v. Leshner	26/36/2
1,125,000	Toshiba Semi Conductor USA v. Consortium	26/24/12
1,100,000	Garvey v. State Farm Fire and Casualty Co.	26/17/8
1,000,000	Bailey v. U-Haul International, Inc.	26/47/3
1,000,000	Klinger v. Plastic & Rubber Products	26/49/21
1,000,000	Thomsen v. Volkswagen of America	26/50/1
750,000	Gonzales v. Underwriters at Lloyds, London	26/37/12
606,096	Supreme Industries, Inc. v. Centurion Boats, Inc.	26/33/18

A10

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
600,000	Lloyd v. Fila Sports, Inc.	26/51/4
600,000	Moss v. Equitable Life Assurance Society	26/43/11
600,000	Shannon v. Jackes-Evans Manufacturing Co.	27/9/10
500,000	Scholtz v. Shearson, Hayden, Stone, Inc.	27/1/3
500,000	Woodland Production Credit Assn. v. Nicholas	26/49/15
455,000	Geller v. 227 East Anapamu St., Ltd.	27/8/37
350,000	Pellegrini v. Aycock	26/39/5
350,000	Stepp v. Great Western Savings & Loan Assn.	26/48/6
250,000	Smith v. Hollywood Collateral Loan Assn.	26/53/4
125,000	Cook v. Sears, Roebuck and Co.	27/14/37
100,000	Granich v. Shapray	27/7/20
100,000	Hill v. National Auto & Casualty Insurance Co.	27/2/22
100,000	Kennedy v. Building Services Local 87	26/20/1
100,000	Lederman v. Pacific Mutual	27/2/28
100,000	Meyer v. Byron Jackson, Inc.	26/39/29
100,000	Newman v. Roston	26/50/39
100,000	Rhea v. RCA Corp.	26/28/18

A11

1983

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$40,025,000	Fellows v. Allstate Insurance Co.	28/23/19
15,000,000	The P.K.L. Companies v. The Eaton Corp.	27/52/21
13,054,479	Berk v. National Union Fire Insurance Co.	27/44/16
8,456,250	Greenberg v. Coldwell Banker Co.	28/20/25
8,000,000	Frazier v. Metropolitan Life Insurance Co.	27/24/21
5,000,000	Sprague v. Equifax, Inc.	27/17/31
2,681,000	Clark v. Wits, Inc.	27/48/16
2,035,000	S.R.H. Fabrics, Inc. v. Formoco Int'l Corp.	27/36/3
2,000,000	Shepler v. Anami Ashram, Inc.	27/18/9
1,800,000	Pitts v. Fibreboard Corp.	28/8/1
1,500,000	Young v. Great Western United, Inc.	27/42/26
1,000,000	Creative Wood Design v. Aetna Casualty and Surety Insurance Co.	28/4/8
1,000,000	Lembo v. Nardoni	28/26/20
900,000	Mancini v. Royal Indemnity Co.	27/21/1
750,000	Glass v. Philip Roxanne, Inc.	28/26/12
750,000	Ladd v. Superfilm, Ltd.	28/26/24
500,000	Four 425 Shatto Bldg. Co. v. Air Conditioning Co., Inc.	27/35/20

A12

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
500,000	Nakahara v. Ace American, Inc.	27/30/7
480,000	Baysinger v. Pacific Mutual Life Insurance Co.	28/19/17
400,000	Sullivan v. Kaiser Foundation Health Plan, Inc.	28/17/25
360,000	Wilson v. Meyer	28/19/34
339,525	Kan v. American District Telegraph Co.	27/42/2
300,000	Adams v. Esparza	27/49/5
250,000	Collins v. Berner	28/15/7
240,000	Robinson v. Firestone Tire & Rubber Co.	27/33/21
225,000	Dime's Group v. Travenol Laboratories, Inc.	28/12/10
220,000	Hobbs v. Batemen, Eichler, Hill Richards	27/24/24
200,000	Bravo v. The Clubhouse	27/44/25
200,000	Shirkhani v. Starcrest Products of California	27/40/14
200,000	Wright v. Randles	27/32/6
150,000	Frankenberger v. Int'l Real Estate Network	28/26/22
150,000	Mammoth Vista Owners Assn. v. General Ins. Co.	27/51/15
150,000	Silverado Title Co. v. Sorensen	28/13/15
139,000	Kelly v. General Telephone Co.	28/25/20

A13

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
125,000	Northrup v. Fink	28/14/7
125,000	Schroeder v. Safeco Insurance Co.	28/7/12
100,000	Americana Air Cargo v. Sendrex Cargo	28/6/23
100,000	Calloway v. Travelers Insurance Co.	27/29/13
100,000	Schwab v. Smith	28/6/14

A14

1984

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$5,000,000	Bertolani v. Equitable Life Assurance Society	28/29/18
5,000,000	Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.	28/28/16
4,300,000	Dustman v. AMC Jeep Corp.	28/41/13
4,000,000	Haughton v. Unigard Mutual Insurance Co.	28/39/24
4,000,000	Royster v. Mission Insurance Co.	28/35/11
3,500,000	Mattie v. Picker Corp.	28/37/9
3,000,000	Litwak v. Fed Mart Corp.	28/44/71
2,660,000	Seeley v. Seymour	28/20/7
2,000,000	Ballou v. Traweek Investment Co., Inc.	28/52/25
2,000,000	Taylor v. State Farm Fire & Casualty Ins. Co.	28/39/22
2,000,000	Tushinsky v. Tushinsky	28/51/21
1,584,000	Phillips v. Travelers Financial Services, Inc.	29/18/16
1,500,000	Davis v. Continental Insurance Co.	28/39/13
1,500,000	Stern v. Dow Corning Corp.	29/17/18
1,500,000	Umann v. Mor-Ben Insurance Markets Corp.	29/16/3
1,150,000	Farrell v. Police & Fireman Insurance Assn.	28/47/12

A15

Jury Verdicts
Weekly
Vol./No./Pg.

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
1,007,000	Satalich v. State Farm Mutual Auto Insurance Co.	28/37/29
1,000,000	McNair v. Worldwide Church of God	29/8/22
750,000	Darblay v. Western Medical Enterprises, Inc.	29/3/10
732,083	Spangler v. Great Southwest Fire Insurance Co.	29/20/31
680,000	Dunkley v. Vermeer Mfg. Co.	28/38/1
650,000	Doe v. Elashi	29/18/37
525,000	Fisher v. 20th Century Insurance Co.	28/49/51
500,000	Ackerman v. K-Mart Discount Stores, Inc.	29/4/24
500,000	Foreman v. United Insurance Co. of America	29/9/11
500,000	Total Experience Records, Inc. v. Lang	29/5/18
442,500	Greenfield v. Spectrum Investment Corp.	28/30/25
400,000	Coastside Publishers and Printers v. Half Moon Bay Review, Inc.	28/16/2
400,000	Jones v. Montgomery Ward	28/34/20
370,000	Weaver v. Grodins of California, Inc.	28/45/5
300,000	Shook v International Dairy Queen, Inc.	29/16/21

A16

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
294,000	Comfort v. Farasa	29/14/11
292,210	Barbara Colton Interiors v. Joesoef	28/50/11
288,750	Waite v. Smith, Klieman & St. Francis Hosp.	29/16/31
276,000	Smith v. J.C. Penney, Inc.	29/18/21
250,000	Hanes v. Davis	28/21/13
244,000	San Jose Cash Register v. Tokyo Electronics Corp.	29/15/8
200,000	Kauric v. Hodgson	28/49/67
200,000	Velzy Engineering & Machine, Inc. v. Western Industrial Corp.	28/51/21
200,000	Vitali v. Bartell	28/34/22
200,000	Wells v. Raymark Industries, Inc.	29/9/6
189,272	United Western Insurance Marketing v. Olken	28/33/16
175,000	Boozer v. All-West Design, Inc.	28/15/12
175,000	Gigliotti v. Collins	28/41/11
175,000	Knott v. Boutin	28/47/11
175,000	Putz v. Industrial Indemnity Co.	29/11/15
160,000	Pusateri v. E.F. Hutton & Co., Inc.	28/48/11
150,000	Agarwal v. Bechtel Corp.	28/19/10
150,000	Smyth v. Herschensohn	29/7/25
140,000	Adams v. California Land Title Co.	28/31/18

A17

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
134,000	Godfrey v. West Coast Folk Clubs, Inc.	29/20/32
125,000	Greenup v. Bankers United Life Assurance Co.	28/44/29
125,000	Sanders v. Airport Park Hotel	28/38/32
125,000	Stewart v. Cal-Farm Insurance Co.	29/7/19
120,000	Allan v. Cal-Farm Insurance Co.	28/33/13
114,000	Nelson v. Arcuri	28/40/9
112,500	Welch v. Marx	28/49/61
102,000	Friedman v. Spataro	29/8/5
100,002	Tassey v. Madera Warehouse Co., Inc.	28/33/11
100,000	Abel v. Abel	28/23/29
100,000	Basque French Bakery v. Toscana Baking Co.	28/39/14
100,000	Coleman & Christianson, Inc. v. Gold Depository and Loan Co.	28/23/2
100,000	Davies v. Parker	28/36/2
100,000	Frazier v. City of Alameda	28/30/1
100,000	Multiplex Insurance Agency, Inc. v. California Life Insurance Co.	29/7/1
100,000	Oranje v. Bank of America	28/22/14

A18

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
100,000	Wilson v. Midland National Life Insurance Co.	28/29/22
100,000	Wright v. Echandi	28/17/18

A19

1985

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$125,000,000	Micro/Vest v. Computerland	29/40/1
46,500,000	Haun v. NEC Electronics	29/28/12
35,000,000	Tan Jay International, Ltd. v. Canadian Indemnity Co.	29/36/23
26,675,000	Kruse v. Bank of America	29/48/11
20,000,000	Rice Growers Assn. v. Transamerica Delaval, Inc.	29/25/7
10,000,000	McCullough v. S & H Insurance Co.	29/20/21
10,000,000	Stanton v. Continental Casualty Co.	30/8/18
8,500,000	Sykes v. Allstate Insurance Co.	30/7/21
7,163,340	Tidwell v. Republic Insurance Co.	30/5/13
7,000,000	Hronis v. Liberty Mutual Insurance Co.	29/32/25
6,243,750	Bryn Mar v. Browne	30/16/32
5,002,500	Eastridge v. Shell Oil Co.	29/19/38
3,500,000	Nielsen v. Atlantic Richfield Co.	30/5/28
3,115,000	Wright v. General Accident Fire & Life Assurance Corp.	30/12/21
3,000,000	Sharma v. Safeco Insurance Co.	29/37/20

A20

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
2,585,000	E & H Wholesale, Inc. v. Glaser Bros.	29/45/18
2,500,000	Fitzsimmons v. American Mutual Insurance Co.	29/37/5
2,500,000	Gagnon v. Continental Casualty Co.	29/41/10
2,453,294	TRW, Inc. v. GTE Products Corp.	29/35/9
2,350,000	Rookhuizen v. Aames Home Loan, Inc.	29/29/27
2,127,500	Crake v. Martin	30/14/36
2,120,000	Young v. Knudsen Corp.	29/18/32
2,002,500	Kreisher v. Mobil Oil	30/29/3
2,000,000	Garrett v. Montgomery Ward Co.	30/2/8
2,000,000	Lisec v. United Airlines	30/26/15
1,500,000	Emerson v. Hitachi Sales Corp.	30/39/32
1,500,000	Thomsen v. Pacific Telephone & Telegraph Co.	29/37/7
1,400,000	Fox v. Hobie Coast Catamaran	29/28/29
1,360,000	Bettencourt v. Fireman's Fund Insurance Co.	29/47/13
1,085,000	Orsatti v. Farmer	29/46/20
1,060,000	Feldman v. Fox and Carskadon	29/38/9
1,007,500	Bryant v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.	29/21/71

A21

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
921,000	Cohen v. ViaCom Enterprises, Inc.	30/11/20
800,000	Backus v. Foremost Insurance Co.	30/7/25
800,000	Stegeman v. Sears, Roebuck and Co.	29/50/1
750,000	Carpet Svc. Systems v. Canadian Indemnity Co.	29/35/23
750,000	Sarno v. Sentry Insurance Co.	29/40/15
700,000	Hughes v. Blue Cross of California	29/27/6
662,500	Cistaro v. GC Services Corp.	29/29/19
606,000	First Real Estate v. Investment Mortgage International, Inc.	30/2/23
500,000	Chapman v. Tera Pharmaceuticals, Inc.	30/3/23
500,000	Pierovich v. Equitable Life Assurance Society	29/47/24
500,000	Russell v. Sentry Indemnity Co.	30/4/20
500,000	Simon v. Eureka Financial Corp.	30/5/6
500,000	Watkins v. Arklin	30/39/27
500,000	Thompson v. Boys Market	30/39/27
400,000	Hess v. Air France	29/23/30
400,000	Kramer, Wilson, Sauvegeau, Inc. v. Sauvegeau	29/38/26
400,000	Morales v. Insurance Co. of No. America	30/8/11

A22

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
400,000	Thomas v. Aubrey	29/48/23
300,000	Foor v. Reliance Insurance Co.	29/35/20
300,000	Ross-Leming v. Continental Insurance Co.	29/33/20
250,000	Ruby v. Industrial Indemnity Co.	29/21/29
241,058	Manhattan Life Insurance Co. v. Eldridge	29/24/22
200,297	Ringham v. A.T. Kearney, Inc.	29/48/15
200,000	Green v. Standard Brands Paint Co.	30/5/24
200,000	Nethery v. Unterthiner	29/42/29
200,000	Stephens v. Coldwell Banker	30/1/6
180,000	Kee v. Farmers Insurance Exchange	29/30/3
176,000	Hooper v. Fort Howard Paper Co.	29/34/19
175,000	Ambrose v. U.S. Steel Corp.	29/46/13
160,000	Moore v. Peterson	29/51/15
150,000	B & H Manu. Co. v. Williamson	30/35/13
150,000	Palmer v. Ted Stevens Honda, Inc.	29/51/7
135,000	Avila v. Commercial Union Insurance Co.	30/9/25
125,000	Wallis v. Beverly Fabrics	30/22/3
118,500	Winograd v. Mangel	29/22/28

A23

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
100,000	Aston v. Yamaha Motor Corp.	29/41/16
100,000	Brown v. Sierra Pacific Power Co.	29/36/31
100,000	Gorospe v. Rosselli	29/21/6
100,000	Jacques Interiors v. Petrak	29/27/24
100,000	Martin v. Farmers Insurance Group	29/34/2
100,000	Martin v. Sunrise Memorial Cemetery	29/26/1
100,000	Ochoa v. Financial Indemnity Co.	29/31/23
100,000	Schletewitz v. Industrial Indemnity Co.	29/36/15
100,000	Ganci v. Air Cal	30/17/31
100,000	Para v. Watsonville Canning Co.	30/17/7

A24

1986

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$20,000,000	Castlerock Properties v. Industrial Indem. Corp.	31/22/12
15,004,700	Bancroft v. Equifax Services, Inc.	30/50/21
14,000,000	April Enterprises, Inc. v. KTTV	30/39/19
9,000,000	Kilroy Industries v. United Pacific Ins. Co.	30/47/18
6,580,750	Owens v. Snap-On Tools	30/40/8
5,600,000	Blough v. State Farm	30/26/33
5,000,000	Leonardini v. Shell Oil Co.	30/40/14
4,000,000	Rodriguez v. Western Dyeing and Finishing Co.	30/39/24
3,000,000	Dean v. Chrysler Corp.	30/46/8
1,900,000	Corsini v. Joannou	31/2/18
1,600,000	Gallego v. Schaefer	30/34/20
1,500,000	Bailey v. Foodmaker, Inc.	30/43/1
1,319,000	Badii v. Imperial Bank	31/6/25
1,250,000	Radell v. Comora	30/40/25
1,000,000	Lorenzetti v. United States Fire Ins. Co.	31/9/15
850,000	Ozdiker v. Crocker National Bank	30/33/18
750,000	Dragich v. Estate of Guyer	30/35/21
750,000	Baldi Brothers Construction Co. v. W.F. Mims	30/18/32
750,000	Fletcher v. San Jose Mercury News	30/36/15

A25

Jury Verdicts
Weekly
Vol./No./Pg.

<u>Amount</u>	<u>Case Name</u>	
700,000	Flores v. Jacobs	30/37/29
675,000	Lee v. State Farm	30/25/21
604,752	Silverman v. Kessler	30/28/23
600,000	Merrill v. Allstate Ins. Co.	30/49/12
521,792	Bramwell v. Standard Register Co.	30/33/11
500,000	Chapman v. Wells Fargo Bank	31/13/24
500,000	Easterling v. Allstate Ins. Co.	31/5/20
475,000	Crusan v. Barrett Furniture Co.	30/34/16
450,000	Marietta Recovery Group, Inc. v. Anania	30/47/9
400,000	Kern v. I.C.C. Industries, Inc.	30/38/19
400,000	Industrial Clutch and Brake, Inc. v. Employers Casualty Co.	30/37/19
400,000	Slater v. Bostitch	31/9/26
350,000	Syverson v. Centennial Ins. Co.	30/52/7
325,000	Sutton v. Mid-Century Ins. Co.	30/43/2
300,000	Snelson v. Imperial Sav. & Loan Assn. of San Diego	30/43/15
300,000	Guerrero v. Figgie Int'l	30/41/28
278,500	Sofos v. Perkins	30/48/08
265,000	J.R. Norton Co. v. General Teamsters, etc. Union, Local 890	30/22/4

A26

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
256,798	Professional Reliable Nursing Service, Inc. v. Waring	30/37/14
250,000	Duffy v. Cavalier	30/23/8
250,000	Smith v. Brown Forman Distillers Corp.	30/30/28
233,000	Geller v. 155 Sansome Street	30/15/4
200,000	Liu v. Interinsurance Exchange	30/38/24
200,000	Nielson v. Fire Insurance Exchange	30/29/7
200,000	Forden v. Vogel	30/24/8
200,000	Wallis v. Farmers Group, Inc.	30/27/8
200,000	Hustede v. Eureka Federal Savings & Loan	30/42/2
200,000	Kinsler v. Deutsch	30/22/22
175,000	Lang v. Healthco Int'l Corp.	30/44/12
175,000	Zuniga v. Baker	30/50/13
159,000	Vacco Industries v. Powell	30/36/24
150,000	Maruca v. General Constr. & Management Co.	30/52/12
150,000	Keenan v. City and County of San Francisco	31/2/8
126,000	Bracy v. Occidental Chemical Co.	31/4/7
125,000	Tobin v. Federal Home Life Ins. Co.	30/46/10
125,000	Victoria v. Kaiser Foundation Hospital	30/34/21

A27

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
120,000	Venegas v. Skaggs	30/32/26
100,000	Faria v. Northwestern National Life Ins. Co.	30/30/20
100,000	Jakymiw v. Custom House Association	30/36/26
100,000	Gilliam v. First National Monetary Corp.	30/41/2
100,000	Long v. Blue Cross of Northern California	31/2/1
100,000	Diehn v. C & C Organization	30/41/31

A28

1987

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$50,000,000	Conlan v. Wells Fargo Bank	31/52/3
30,000,000	Stanghellini v. Bank of America	32/12/18
22,666,656	Bank of California v. Davis	31/50/16
16,950,000	Collett v. Pluess-Staufer, Inc.	31/41/36
15,000,000	Abellon v. Hartford Ins. Co.	32/15/26
12,963,320	American Motor Inns, Inc. v. Harbor Ins. Co.	32/18/16
5,000,000	Crandall-Millar v. Sierra Vista Hospital	32/1/10
5,000,000	Klein v. Oakland Raiders	31/26/39
4,000,000	Warren v. Colonial Penn Franklin Ins. Co.	31/39/18
3,000,000	Mitchell v. Ferrer	32/18/1
2,914,180	Vigil v. Farmers New World Life Ins. Co.	31/28/1
2,603,765	Vargas v. Retail Clerks Union, Local 1428	31/30/23
2,510,000	KS+A Marketing, Inc. v. Xebec, Inc.	31/37/10
2,500,000	Jenkins v. Insurance Co. of North America	32/3/23
2,290,000	Bryan v. Hudson Bay Mining and Smelting Co.	31/46/25
2,250,000	Pratt v. Stewart Title Co.	31/27/24

A29

Jury Verdicts
Weekly
Vol./No./Pg.

<u>Amount</u>	<u>Case Name</u>	
2,000,000	Kasparian v. Hahn, Cazier & Leff	31/26/24
1,576,500	Gourley v. State Farm Mutual Ins. Co.	31/16/22
1,500,000	Singer v. Ohio Casualty Ins. Co.	31/31/25
1,000,000	Lanouette v. Ciba-Geigy	31/26/18
1,000,000	Johnson v. Spelling-Goldberg Productions	32/15/19
1,000,000	Evans v. Continental Ins. Co.	32/15/22
1,000,000	Rogers v. First Alliance Mortgage Co.	32/8/20
795,000	Kopanic v. Eichenlaub	31/31/6
750,000	Adams v. Murakami	32/5/21
540,000	Ratzlaff v. Chemgold, Inc.	31/47/7
500,000	Cheval v. Great Republic Ins. Co.	31/47/2
500,000	Dean's Materials v. Pacific Telephone & Telegraph Co.	32/29/10
500,000	Stein v. Domyan	31/21/20
500,000	Heilig v. Liquid Air Corp.	31/13/6
450,000	Theisen v. Sommer and Maca Industries, Inc.	31/36/8
400,000	De La Cerda v. Bonded Home Loans	31/48/18
392,264	Conway v. Qualidyne Systems	32/28/37
275,000	Mitchell v. High Society Magazine, Inc.	31/27/20

A30

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
272,859	Luck v. Southern Pacific Transportation Co.	32/9/7
250,000	Morimoto v. Ticor Title Ins. & Trust Co.	32/7/18
250,000	JHJ Co., Inc. v. Farmers Rental Service, Inc.	31/49/15
250,000	Central Bag and Supply Co. v. Int'l Baking Co., Inc.	31/22/19
250,000	Menchaca v. Hammond	31/26/37
250,000	Jafari v. Pahlavan	31/42/10
250,000	Johnson v. Metropolitan Life Ins. Co.	31/42/8
250,000	Arakelian v. Millman	32/2/1
235,600	Nelson v. Shell Oil Co.	32/4/19
225,000	State of Calif. Dept. of Transp. v. Storage Services	32/18/7
200,001	Mobarry v. Lobherr	31/49/25
200,000	Davis v. General Accident Ins. Co.	32/6/12
200,000	Public Ins. Service, Inc. v. Carlisle Ins. Co.	31/25/20
200,000	Westbrook v. Fairchild	31/14/25
200,000	Becker v. Opus Three	31/46/5
150,000	Johnson v. Visalia Newspapers, Inc.	31/21/18
150,000	Curry v. Shell Oil Co.	31/48/3
150,000	Battensehlag v. McCandless	32/23/27
145,125	Beck v. Zattiero	31/23/4
141,000	Dumas v. Stocker	31/35/36
125,000	Casey v. MCI Digital Information Services Corp.	31/35/12

A31

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
125,000	Rode v. Shearson/American Express, Inc.	32/3/27
120,500	Schmidt v. Hyatt Corp.	31/26/9
103,000	Cervenka v. Centro Corp.	31/44/39
100,000	Sims v. Valley Crest Landscape, Inc.	31/45/19
100,000	Sobek v. Sutherland	31/42/3
100,000	Wickes Companies, Inc. v. Tejon Ranch Co.	31/49/14
100,000	Wright v. Holm	31/9/1

A32

1988

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$147,000,000	Baroway v. KMG Main Hurdman	32/49/16
85,000,000	Riddle v. Southmark Corp.	33/17/33
10,750,000	Young v. Von's Markets	33/7/27
10,500,000	Wegis v. J.G. Boswell Co.	33/6/15
5,006,500	Molett v. Farmers Ins. Exchange	33/13/19
5,000,000	Potter v. Fire Ins. Exchange	33/3/9
3,000,000	Duggan v. Hasso	32/48/11
2,500,000	Amirian v. Brockton Plaza	32/42/23
2,000,000	Koch Membrane Systems v. Advanced Membrane Tech., Inc.	32/41/24
1,500,000	R.A. Fields Co., Inc. v. Mission Industries, Inc.	33/17/15
1,045,000	Roberts v. Ford Aerospace, Inc.	33/21/33
875,000	Adcotech Corp. v. Equitec Leasing Co.	32/36/3
800,001	Farajpour v. University of Southern California	33/11/25
750,000	Abel v. Automobile Club of So. California	32/51/29
750,000	Koire v. Transamerica Occidental Life Ins. Co.	32/49/31
700,000	Dixon v. Fremont Rendezvous, Inc.	33/19/2
650,000	Redlick v. Anderson	32/20/9

A33

Jury Verdicts
Weekly
Vol./No./Pg.

<u>Amount</u>	<u>Case Name</u>	
500,000	Evans v. Rolling Hills Community Assn.	32/27/16
300,000	Brooks v. Mercury Cas. Co.	32/32/18
280,000	American Nursing Resources, Inc. v. Doe	32/49/4
250,000	Patrick v. Maryland Cas. Co.	32/32/3
250,000	Chappell Masonry, Inc. v. Swanston	33/14/4
250,000	Newell v. Silen	32/36/15
150,000	Moore v. Perry	33/26/20
150,000	Casebolt v. Cranfill	33/21/30
145,487	Cavin v. Fremont Ford	33/23/1
125,000	Van Pelt v. Safeway Stores, Inc.	32/46/3
101,000	Lamont v. State Farm Mutual Auto. Ins. Co.	32/30/2
100,000	Jahamardi v. Tandy Corp.	33/15/24

A34

1989

Punitive Damage Jury Verdicts
\$100,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
\$12,000,000	Kasparian v. Fremont Indemnity Co.	33/45/19
7,250,000	Christian v. Estate of Rock Hudson	33/33/21
6,500,000	Jones v. Johnson Controls, Inc.	33/25/28
5,500,000	Hacker v. Roscoe Moss Co.	33/26/29
4,500,000	Mercedes-Benz of N. A., Inc. v. Hartford Acc. & Indem. Co.	33/40/26
3,800,000	DuBarry Int'l, Inc. v. Southwest Forest Industries, Inc.	33/39/27
3,000,000	Chitwood v. Founders Title Co.	33/31/17
3,000,000	Fernandez v. Citicorp Credit Services	33/28/23
2,500,000	Belle Haven Realty Co. v. CAZ Dev. Co. Eight	33/37/11
2,400,000	Rider v. Flynt	34/10/22
2,014,281	Perrotti v. Syntex Laboratories, Inc.	34/15/22
2,000,000	Signal Carousel Apartments v. Imperial Bank	34/14/28
2,000,000	Kinzel v. Messieh	33/38/23
2,000,000	Bacciocco v. Myers	33/32/4
2,000,000	Jackson v. GAB Business Service, Inc.	33/37/25
2,000,000	Nutri-Metrics v. Gigi Enterprises	34/2/25

A35

Jury Verdicts
Weekly
Vol./No./Pg.

<u>Amount</u>	<u>Case Name</u>	
1,538,000	Ertel v. Kersenbrok	34/11/26
1,060,910	Will v. United Pacific Ins. Co.	33/41/29
1,000,000	Mack v. Pepperidge Farm, Inc.	34/10/30
1,000,000	Bourn v. Farmers Ins. Group	33/36/25
1,000,000	Tinmahan Consultants, Inc. v. Bank of America	33/20/6
850,000	Doyle v. Pattison	34/11/27
850,000	Beeler v. Rent A Car Cheep, Inc.	34/17/25
800,000	Martinolich v. Freedom Newspapers, Inc.	33/38/31
750,000	General Money Order Co., Inc. v. Reese	33/41/19
625,000	D'Arcy v. Union Oil Co. of California	33/26/13
521,000	Calderoni v. Johnston Builders, Inc.	34/8/6
520,000	Weissman v. Terra Nova Industries	33/46/2
500,000	Carpenter v. Snider	33/39/17
425,000	Prillig v. Bianchini	33/29/15
400,000	Spraylat Corp. v. International Marketing, Inc.	34/11/17
400,000	Todt v. Hoh Water Technology Corp.	33/25/25
350,000	Henderson v. Varley	33/49/30
300,000	Cooper v. Fireman's Fund Ins. Companies	34/4/16
300,000	Williams v. State Farm Fire & Cas. Co.	33/45/1

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>
257,500	Lamonica v. Bank of America	33/35/2
250,000	Espinola v. Fluid Systems Division, UOP, Inc.	33/50/33
200,000	Sperling v. Burger King	33/40/16
200,000	Monia v. Parnas Corp.	33/43/11
200,000	Monasterio v. Cal Fed Insurance Agency	33/41/19
175,000	Hopson v. Gilleon	33/49/32
150,000	Baumgarten v. Bonanza Management Co.	33/25/1
150,000	Hoffman v. Provident Federal Savings	33/40/12
150,000	Conner v. Marilyn Miglin, Inc.	33/22/10
140,000	Security Pacific National Bank v. Alcaino	33/47/25
123,000	Los Angeles Firemen's Credit Union v. Kennedy	33/48/19
112,000	Olguin v. Shipe	33/39/12
100,000	Enfield v. Ohio Casualty Ins. Co.	34/4/22

APPENDIX B

1976

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>	<u>Result of New Trial Motion Re: Punitive Damages</u>	<u>Source for Result</u>
\$5,300,000	Austero v. Washington National Insurance Co.	20/30/38	Remitted to \$250,000	Ira Rivin Attorney for Defendant

1977

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>	<u>Result of New Trial Motion Re: Punitive Damages</u>	<u>Source for Result</u>
\$10,000,000	Rosener v. Sears, Roebuck & Co.	21/5/2	Denied	110 Cal.App.3d 740, 752
2,000,000	Von Brimer v. Whirlpool Corp.	22/4/11	Granted	Christina Snyder Attorney for Plaintiff

B2

1978

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>	<u>Result of New Trial Motion Re: Punitive Damages</u>	<u>Source for Result</u>
\$125,000,000	Grimshaw v. Ford Motor Co.	22/14/26	Remitted to \$3.5 million	119 Cal.App.3d 757, 772
4,000,000	Hasson v. Ford Motor Co.	22/45/23	Denied	32 Cal.3d 388, 398
1,750,000	Pawlaczyk v. American Hospital Supply Co.	22/36/18	Denied	John Gilmore Attorney for Defendant
1,500,000	Marmar v. Richards Manufacturing Co.	22/29/19	Denied	Arthur Schwimmer Attorney for Plaintiff
1,075,000	Jones v. Bank of America	22/52/4	Granted	George Duff Attorney for Defendant
1,000,000	Bialak v. Montgomery Ward Co.	22/51/14	Remitted to \$500,000	James Waldorf Attorney for Defendant

B3

1979

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> Weekly <u>Vol./No./Pg.</u>	<u>Result of</u> New Trial Motion Re: Punitive Damages	<u>Source for</u> Result
\$17,750,003	Harmsen v. Smith	24/5/23	Denied	Jury Verdicts
11,058,810	Seaman's Direct Buying Service v. Standard Oil Co. of Cal.	23/51/1	Remitted to \$7 million	Weekly 36 Cal.3d 752, 762
1,500,001	Kanins v. American Hawaiian Steamship Co.	24/2/29	Denied	Ellis J. Horvitz ^d Attorney for Defendant
1,310,000	Helderman v. Int'l Brotherhood of Elec. Wrks.	23/17/3	Denied	Alan C. Davis Attorney for Defendant
1,000,000	MPB Associates v. United California Bank	23/46/6	Remitted to \$0	Robert Lofts Attorney for Defendant

B4

1980

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> Weekly <u>Vol./No./Pg.</u>	<u>Result of</u> New Trial Motion Re: Punitive Damages	<u>Source for</u> Result
\$9,900,000	Union Bank v. Fireman's Fund Ins. Co.	24/25/27	Remitted to \$1 million	Maynard Brown Attorney for Defendant
6,510,000	Golf West of Kentucky, Inc. v. Life Investors, Inc.	24/33/22	Denied	Jerold V. Goldstein Attorney for Defendant
4,500,000	Norman v. Colonial Penn Franklin Life Insurance Co.	24/52/19	Denied	John Hager Attorney for Defendant
3,000,000	Sanders Farms, Inc. v. Griffin	24/43/18	Remitted to \$200,000	Jury Verdicts Weekly
2,200,000	C.C. Davis & Co. v. Alioto	24/28/2	Remitted to \$264,000	James Penrod Attorney for Plaintiff

B5

1980 Continued

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> <u>Weekly</u> <u>Vol./No./Pg.</u>	<u>Result of</u> <u>New Trial Motion</u> <u>Re: Punitive</u> <u>Damages</u>	<u>Source for</u> <u>Result</u>
1,500,000	Wayte v. Rollins International, Inc.	25/8/12	Remitted to \$408,000	169 Cal.App.3d 1, 9
1,350,000	Uhlmann Offices, Inc. v. City National Bank	24/51/13	Remitted to \$350,000	Ellis J. Horvitz Attorney for Plaintiff
1,000,000	Glover v. Allstate Insurance Co.	25/2/19	Denied	Donald Ruston Attorney for Defendant
1,000,000	Pistorius v. Prudential Insurance Co.	24/17/3	Denied	123 Cal.App.3d 541, 544 n.2

B6

1981

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> <u>Weekly</u> <u>Vol./No./Pg.</u>	<u>Result of</u> <u>New Trial Motion</u> <u>Re: Punitive</u> <u>Damages</u>	<u>Source for</u> <u>Result</u>
\$3,117,946	Spieker v. Senator Hotel Associates	26/5/8	Denied	Theodore Marois Attorney for Defendant
3,000,000	Betts v. Allstate Insurance Co.	25/48/17	Denied	154 Cal.App.3d 688, 697
2,500,000	Moore v. American United Life Insurance Co.	26/15/13	Denied	150 Cal.App.3d 610, 642
2,073,559	The Glovatorium, Inc. v. Nat'l Cash Register	25/25/4	Denied	William Irvin Attorney for Defendant
2,000,000	Aceto v. Certified Life Ins. Co. of Cal.	25/27/10	Remitted to \$1 million	Jury Verdicts Weekly
2,000,000	California Shoppers, Inc. v. Royal Globe Insurance Co.	25/38/15	Denied; JNOV granted	175 Cal.App.3d 1, 13

B7

1981 Continued

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> Weekly <u>Vol./No./Pg.</u>	<u>Result of</u> New Trial Motion Re: Punitive Damages	<u>Source for</u> Result
2,000,000	Smithers v. Metro-Goldwyn-Mayer, Inc.	25/46/24	Remitted to \$1 million	Jury Verdicts Weekly
1,500,000	Hinton v. Venture Out in America, Inc.	25/13/8	Denied	Jury Verdicts Weekly
1,500,000	Marino v. Synanon Church	25/43/7	Remitted to \$1 million	Daniel Crawford Attorney for Defendant
1,300,000	Burnett v. National Enquirer, Inc.	25/25/23	Remitted to \$750,000	144 Cal.App.3d 991, 997

B8

1982

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> Weekly <u>Vol./No./Pg.</u>	<u>Result of</u> New Trial Motion Re: Punitive Damages	<u>Source for</u> Result
\$17,500,000	The P.K.L. Companies v. The Eaton Corp.	26/28/23	Granted	Jury Verdicts Weekly (27/52/21)
10,000,000	West v. Johnson & Johnson Products, Inc.	27/13/8	Remitted to \$1 million	174 Cal.App.3d 831, 840
4,500,000	Norton v. Kaiser Steel Corp.	26/51/30	Granted	Jury Verdicts Weekly
3,000,000	Pitzer v. Security Pacific National Bank	26/18/27	Denied	J. Randall Faith Attorney for Defendant
2,500,000	Pollard v. National Life & Accident Co.	26/50/26	Denied	Jury Verdicts Weekly
2,250,000	Beltz Travel Service, Inc. v. Trans World Airlines	26/15/4	Denied	Steve Tausz Attorney for Defendant

B9

1982 Continued

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> <u>Weekly</u> <u>Vol./No./Pg.</u>	<u>Result of</u> <u>New Trial Motion</u> <u>Re: Punitive</u> <u>Damages</u>	<u>Source for</u> <u>Result</u>
2,000,000	Boles v. Travelers Indemnity Co.	27/17/5	Remitted to \$1.2 million	Jury Verdicts Weekly
1,500,000	Travelers Insurance Co. v. Leshner	26/36/2	No motion filed	Jury Verdicts Weekly
1,125,000	Toshiba Semi Conductor USA v. Consortium	26/24/12	Denied	Thomas Hartwell
1,100,000	Garvey v. State Farm Fire and Casualty Co.	26/17/8	Denied	Attorney for Defendant
1,000,000	Bailey v. U-Haul International, Inc.	26/47/3	Denied	Jury Verdicts Weekly
1,000,000	Klinger v. Plastic & Rubber Products	26/49/21	Denied	Jury Verdicts Weekly
1,000,000	Thomsen v. Volkswagen of America	26/50/1	Denied	Hillel Chodos
				Attorney for Plaintiff
				James Crawford
				Attorney for Plaintiff

B10

1983

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> <u>Weekly</u> <u>Vol./No./Pg.</u>	<u>Result of</u> <u>New Trial Motion</u> <u>Re: Punitive</u> <u>Damages</u>	<u>Source for</u> <u>Result</u>
\$40,025,000	Fellows v. Allstate Insurance Co.	28/23/19	Granted	Judith Gold
15,000,000	The P.K.L. Companies v. The Eaton Corp.	27/52/21	Denied	Attorney for Defendant
13,054,479	Berk v. National Union Fire Insurance Co.	27/44/16	Denied	Jury Verdicts Weekly
8,456,250	Greenberg v. Coldwell Banker Co.	28/20/25	Remitted to \$2 million	Jury Verdicts Weekly
8,000,000	Frazier v. Metropolitan Life Insurance Co.	27/24/21	Remitted to \$2 million	Ellis J. Horvitz
5,000,000	Sprague v. Equifax, Inc.	27/17/31	Remitted to \$1 million	Attorney for Plaintiff
				169
				Cal.App.3d 90, 94
				166
				Cal.App.3d 1012

B11

1983 Continued

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> <u>Weekly</u> <u>Vol./No./Pg.</u>	<u>Result of</u> <u>New Trial Motion</u> <u>Re: Punitive</u> <u>Damages</u>	<u>Source for</u> <u>Result</u>
2,681,000	Clark v. Wits, Inc.	27/48/16	Denied	Scott Spolin Attorney for Defendant
2,035,000	S.R.H. Fabrics, Inc. v. Formoco Int'l Corp.	27/36/3	Denied	Peter Bersin Attorney for Defendant
2,000,000	Shepler v. Anami Ashram, Inc.	27/18/9	Denied	Burton McGovern Attorney for Defendant
1,800,000	Pitts v. Fibreboard Corp.	28/8/1	Denied	Jury Verdicts Weekly Jury Verdicts Weekly Jonathan Erb
1,500,000	Young v. Great Western United, Inc.	27/42/26	Denied	Attorney for Defendant Tony Hemming Attorney for Defendant
1,000,000	Creative Wood Design v. Aetna Casualty and Surety Insurance Co.	28/4/8	Denied	
1,000,000	Lembo v. Nardoni	28/26/20	Denied	

B12

1984

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> <u>Weekly</u> <u>Vol./No./Pg.</u>	<u>Result of</u> <u>New Trial Motion</u> <u>Re: Punitive</u> <u>Damages</u>	<u>Source for</u> <u>Result</u>
\$5,000,000	Bertolani v. Equitable Life Assurance Society	28/29/18	Denied	Jury Verdicts Weekly 189 Cal.App.3d 1072, 1099
5,000,000	Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.	28/28/16	Denied	Russell Reiner Attorney for Plaintiff
4,300,000	Dustman v. AMC Jeep Corp.	28/41/13	Remitted to \$1 million	Jury Verdicts Weekly David Simon Attorney for Defendant
4,000,000	Haughton v. Unigard Mutual Insurance Co.	28/39/24	Denied	Jury Verdicts Weekly
4,000,000	Royster v. Mission Insurance Co.	28/35/11	Denied	Attorney for Defendant Jury Verdicts Weekly
3,500,000	Mattie v. Picker Corp.	28/37/9	Denied	Jury Verdicts Weekly
3,000,000	Litwak v. Fed Mart Corp.	28/44/71	Denied	Jury Verdicts Weekly

B13

1984 Continued

B14

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> <u>Weekly</u> <u>Vol./No./Pg.</u>	<u>Result of</u> <u>New Trial Motion</u> <u>Re: Punitive</u> <u>Damages</u>	<u>Source for</u> <u>Result</u>
2,660,000	Seeley v. Seymour	28/20/7	Denied	John Dickson Attorney for Defendant
2,000,000	Ballou v. Traweek Investment Co., Inc.	28/52/25	Remitted to \$250,000	Jury Verdicts Weekly
2,000,000	Taylor v. State Farm Fire & Casualty Insurance Co.	28/39/22	Denied	Jury Verdicts Weekly
2,000,000	Tushinsky v. Tushinsky	28/51/21	Denied	Jury Verdicts Weekly
1,584,000	Phillips v. Travelers Financial Services, Inc.	29/18/16	Denied	Geoffrey Bourroughs Attorney for Defendant
1,500,000	Davis v. Continental Insurance Co.	28/39/13	Denied	Jury Verdicts Weekly

B15

1,500,000	Stern v. Dow Corning Corp.	29/17/18	Denied	Sonja Blomquist Attorney for Defendant
1,500,000	Umann v. More-Ben Insurance Markets Corp.	29/16/3	Remitted to \$750,000	Jury Verdicts Weekly
1,150,000	Farrell v. Police & Fireman Insurance Assn.	28/47/12	Remitted to \$161,000	Jury Verdicts Weekly
1,007,000	Satalich v. State Farm Mutual Auto Insurance Co.	28/37/29	Settled prior to new trial hearing	Ryan Knapp Attorney for Defendant
1,000,000	McNair v. Worldwide Church of God	29/8/22	Denied	Jury Verdicts Weekly

1985

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> Weekly Vol./No./Pg.	<u>Result of</u> New Trial Motion Re: Punitive Damages	<u>Source for</u> Result
\$125,000,000	Micro/Vest v. Computerland	29/40/1	Denied	Jury Verdicts Weekly Jury
46,500,000	Haun v. NEC Electronics	29/28/12	Granted	Verdicts Weekly Jury
35,000,000	Tan Jay International, Ltd. v. Canadian Indemnity Co.	29/36/23	Remitted to \$500,000	Verdicts Weekly Joseph Ryan Attorney for Defendant
26,675,000	Kruse v. Bank of America	29/48/11	Remitted to \$6 million	Jury Verdicts Weekly Ellis J. Horvitz Attorney for Defendant
20,000,000	Rice Growers Assn. v. Transamerica Delaval, Inc.	29/25/7	Remitted to \$1 million	Verdicts Weekly Ellis J. Horvitz Attorney for Defendant
10,000,000	McCullough v. S & H Insurance Co.	29/20/21	Remitted to \$6 million	Claire Johnson Attorney for Defendant

B16

10,000,000	Stanton v. Continental Casualty Co.	30/17/19	Remitted to \$5 million	Jury Verdicts Weekly David Zwieg Attorney for Defendant
8,500,000	Sykes v. Allstate Insurance Co.	30/7/21	Denied	Jury Verdicts Weekly Ellis J. Horvitz Attorney for Defendant
7,163,340	Tidwell v. Republic Insurance Co.	30/5/13	Remitted to \$932,550	Ellis J. Horvitz Attorney for Defendant
7,000,000	Hronis v. Liberty Mutual Insurance Co.	29/32/25	Remitted to \$2 million	Ellis J. Horvitz Attorney for Defendant
6,243,750	Bryn Mar v. Browne	30/16/32	Remitted to \$4,242,995	Ellis J. Horvitz Attorney for Defendant
5,002,500	Eastridge v. Shell Oil Co.	29/19/38	Denied	Harris Steinberg Attorney for Plaintiff
3,500,000	Nielsen v. Atlantic Richfield Co.	30/5/28	Denied	Jury Verdicts Weekly Ellis J. Horvitz Attorney for Defendant
3,115,000	Wright v. General Accident Fire & Life Assurance Corp.	30/12/21	Remitted to \$2,260,000	Ellis J. Horvitz Attorney for Defendant

B17

1985 Continued

B18

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> Weekly <u>Vol./No./Pg.</u>	<u>Result of</u> New Trial Motion Re: Punitive Damages	<u>Source for</u> Result
3,000,000	Sharma v. Safeco Insurance Co.	29/37/20	Remitted to \$1 million	Jury Verdicts Weekly
2,585,000	E & H Wholesale, Inc. v. Glaser Bros.	29/37/20	Settled prior to new trial hearing	Peter Gelblum Attorney for Defendant
2,500,000	Fitzsimmons v. American Mutual Insurance Co.	29/37/5	Remitted to \$350,000	Jury Verdicts Weekly
2,500,000	Gagnon v. Continental Casualty Co.	29/41/10	Denied	Jury Verdicts Weekly
2,453,294	TRW, Inc. v. GTE Products Corp.	29/35/9	Denied	Ardell Johnson Attorney for Defendant
2,350,000	Rookhuizen v. Aames Home Loan, Inc.	29/29/27	Denied	Gordon Opel Attorney for Defendant

B19

2,127,500	Crake v. Martin	30/14/36	Settled prior to new trial hearing	Michael Portugal Attorney for Defendant
2,120,000	Young v. Knudsen Corp.	29/18/32	Settled prior to new trial hearing	Benjamin Williams Attorney for Defendant
2,002,500	Kreisher v. Mobil Oil	30/29/3	Denied	William O'Brien Attorney for Defendant
2,000,000	Garrett v. Montgomery Ward Co.	30/2/8	Denied	Zachary Smith Attorney for Defendant
2,000,000	Lisec v. United Airlines	30/26/15	Denied	Jury Verdicts Weekly
1,500,000	Emerson v. Hitachi Sales Corp.	30/39/32	Remitted to \$200,000	Craig Jorgenson Attorney for Defendant
1,500,000	Thomsen v. Pacific Telephone & Telegraph Co.	29/37/7	Denied	Jury Verdicts Weekly

1985 Continued

B20

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>	<u>Result of New Trial Motion Re: Punitive Damages</u>	<u>Source for Result</u>
1,400,000	Fox v. Hobie Coast Catamaran	29/28/29	Remitted to \$1.1 million	Morton Caplan Attorney for Defendant
1,360,000	Bettencourt v. Fireman's Fund Insurance Co.	29/47/13	Denied	Jury Verdicts Weekly
1,085,000	Orsatti v. Farmer	29/46/20	Remitted to \$0	Robert Wilson Attorney for Defendant
1,060,000	Feldman v. Fox and Carskadon	29/38/9	Remitted to \$250,000	Jury Verdicts Weekly
1,007,500	Bryant v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.	29/21/71	Remitted to \$151,000	Jury Verdicts Weekly

1986

Punitive Damage Jury Verdicts
\$1,000,000 And Over

B21

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>	<u>Result of New Trial Motion Re: Punitive Damages</u>	<u>Source for Result</u>
\$20,000,000	Castlerock Properties v. Industrial Indem. Co.	31/22/12	Granted	Jury Verdicts Weekly
15,004,700	Bancroft v. Equifax Services, Inc.	30/50/21	Remitted to \$1,500,000	Peter Taft Attorney for Defendant
14,000,000	April Enterprises, Inc. v. KTTV	30/39/19	Denied	Superior Court File
9,000,000	Kilroy Industries v. United Pacific Ins. Co.	30/47/18	Denied	Mark Clarke Attorney for Plaintiff
6,580,750	Owens v. Snap-On Tools	30/40/8	Settled prior to ruling	Robert G. Partridge Attorney for Defendant
5,600,000	Blough v. State Farm	30/26/33	Denied	Jury Verdicts Weekly
5,000,000	Leonardini v. Shell Oil Co.	30/40/14	Denied	Jury Verdicts Weekly

B22

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> <u>Weekly</u> <u>Vol./No./Pg.</u>	<u>Result of</u> <u>New Trial Motion</u> <u>Re: Punitive</u> <u>Damages</u>	<u>Source for</u> <u>Result</u>
4,000,000	Rodriguez v. Western Dyeing and Finishing Co.	30/39/24	Denied	Ellis J. Horvitz Attorney for Defendant
3,000,000	Dean v. Chrysler Corp.	30/46/8	Remitted to \$900,000	Jury Verdicts Weekly
1,900,000	Corsini v. Joannou	31/2/18	Remitted to \$500,000	Jury Verdicts Weekly
1,600,000	Gallego v. Schaefer	30/34/20	Denied	Jury Verdicts Weekly
1,500,000	Bailey v. Foodmaker, Inc.	30/43/1	Remitted to \$1,000,000	Jury Verdicts Weekly
1,319,000	Badii v. Imperial Bank	31/6/25	No motion filed	Jury Verdicts Weekly
1,250,000	Radell v. Comora	30/40/25	Denied	Jury Verdicts Weekly and 211
1,000,000	Lorenzetti v. United States Fire Ins. Co.	31/9/15	Denied	Cal.App.3d 1244, 1257 Jury Verdicts Weekly

B23

1987

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> <u>Weekly</u> <u>Vol./No./Pg.</u>	<u>Result of</u> <u>New Trial Motion</u> <u>Re: Punitive</u> <u>Damages</u>	<u>Source for</u> <u>Result</u>
\$50,000,000	Conlan v. Wells Fargo Bank	31/52/3	Remitted to \$25,000,000	Jury Verdicts Weekly
30,000,000	Stanghellini v. Bank of America	32/12/18	Denied	Jury Verdicts Weekly
22,666,656	Bank of California v. Davis	31/50/16	Remitted to \$11,200,000	Hartley T. Hansen Attorney for Defendant
16,950,000	Collett v. Pluess-Stauffer, Inc.	3/41/36	Remitted to \$3,850,000	Jury Verdicts Weekly
15,000,000	Abellon v. Hartford Ins. Co.	32/15/26	Denied	Jury Verdicts Weekly
12,963,320	American Motor Inns, Inc. v. Harbor Ins. Co.	32/18/16	Remitted to \$3,000,000	Jury Verdicts Weekly

1987 Continued

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>	<u>Result of New Trial Motion Re: Punitive Damages</u>	<u>Source for Result</u>
5,000,000	Crandall-Millar v. Sierra Vista Hospital	32/1/10	Settled prior to hearing	George R. Hillsinger Attorney for Defendant
5,000,000	Klein v. Oakland Raiders	31/26/39	Remitted to \$1,000,000	211 Cal.App.3d 67, 73
4,000,000	Warren v. Colonial Penn Franklin Ins. Co.	31/39/18	Denied	Walter M. Yoka Attorney for Defendant
3,000,000	Mitchell v. Ferrer	32/18/1	Remitted to \$500,000	Jury Verdicts Weekly
2,914,180	Vigil v. Farmers New World Life Ins. Co.	31/28/1	Remitted to \$917,475	Stephen A. McFeely Attorney for Defendant
2,603,765	Vargas v. Retail Clerks Union, Local 1428	31/30/23	Denied	Jury Verdicts Weekly
2,510,000	KS+A Marketing, Inc. v. Xebec, Inc.	31/37/10	Denied	Robert A. Christopher Attorney for Defendant
2,500,000	Jenkins v. Insurance Co. of North America	32/3/23	Denied	Jury Verdicts Weekly

B24

2,290,000	Bryan v. Hudson Bay Mining & Smelting Co.	31/46/25	Remitted to \$250,000	Paul W. Shapiro Attorney for Plaintiff
2,250,000	Pratt v. Stewart Tile Co.	31/27/24	Remitted to \$900,000	Superior Court File
2,000,000	Kasparian v. Hahn, Crazier & Leff	31/26/24	Granted	Jury Verdicts Weekly
1,576,500	Gourley v. State Farm Mutual Ins. Co.	31/16/22	Denied	Ellis J. Horvitz Attorney for Defendant
1,500,000	Singer v. Ohio Casualty Ins. Co.	31/31/25	Denied	Jury Verdicts Weekly
1,000,000	Lanouette v. Ciba-Geigy	31/26/18	Denied	Jury Verdicts Weekly
1,000,000	Johnson v. Spelling-Goldberg Productions	32/15/19	Remitted to \$333,000	Jury Verdicts Weekly
1,000,000	Evans v. Continental Ins. Co.	32/15/22	Settled prior to hearing	Theodore P. Shield Attorney for Defendant
1,000,000	Rogers v. First Alliance Mortgage co.	32/8/20	Granted	Jury Verdicts Weekly

B25

1988

Punitive Damage Jury Verdicts
\$1,000,000 And Over

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts Weekly Vol./No./Pg.</u>	<u>Result of New Trial Motion Re: Punitive Damages</u>	<u>Source for Result</u>
\$147,000,000	Baroway v. KMG Main Hurdman	32/49/16	Denied	Jury Verdicts Weekly
85,000,000	Riddle v. Southmark Corp.	33/17/33	Remitted to \$17,000,000	Ellis J. Horvitz Attorney for Defendant
10,750,000	Young v. Von's Markets	33/7/27	Remitted to \$600,000	Jury Verdicts Weekly
10,500,000	Wegis v. J.G. Boswell Co.	33/6/15	Granted	Harvey H. Means Attorney for Defendant
5,006,500	Molett v. Farmers Ins. Exchange	33/13/19	Denied	Jury Verdicts Weekly
5,000,000	Potter v. Fire Ins. Exchange	33/3/9	Denied	Jury Verdicts Weekly

B26

3,000,000	Duggan v. Hasso	32/48/11	Remitted to \$2,000,000	Jury Verdicts Weekly
2,500,000	Amirian v. Brockton Plaza	32/42/23	Denied	Jury Verdicts Weekly
2,000,000	Koch Membrane Systems v. Advance Membrane Tech., Inc.	32/41/24	Granted	William C. Stephen Attorney for Defendant
1,500,000	R.A. Fields Co., Inc. v. Mission Industries, Inc.	33/17/15	Granted	Jury Verdicts Weekly
1,045,000	Roberts v. Ford Aerospace, Inc.	33/21/33	Denied	Jury Verdicts Weekly

B27

Punitive Damage Jury Verdicts
\$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
\$12,000,000	Kasparian v. Fremont Indemnity Co.	33/45/19	Denied	Jury Verdicts Weekly
7,250,000	Christian v. Estate of Rock Hudson	33/33/21	Remitted to \$500,000	Jury Verdicts Weekly
6,500,000	Jones v. Johnson Controls, Inc.	33/25/28	Denied	Ellis J. Horvitz Attorney for Defendant
5,500,000	Hacker v. Roscoe Moss Co.	33/26/29	Granted	Jury Verdicts Weekly
4,500,000	Mercedes-Benz of N.A., Inc. v. Hartford Acc. & Indem. Co.	33/40/26	Remitted to \$500,000	Jury Verdicts Weekly
3,800,000	DuBarry Int'l, Inc. v. Southwest Forest Industries, Inc.	33/39/27	Denied	Jury Verdicts Weekly
3,000,000	Chitwood v. Founders Title Co.	33/31/17	Denied	Jury Verdicts Weekly

B28

3,000,000	Fernandez v. Citicorp Credit Services	33/28/23	Remitted to \$1,500,000	Superior Court File
2,500,000	Belle Haven Reality Co. v. CAZ Dev. Co. Eight	33/37/11	Denied	Jury Verdicts Weekly
2,400,000	Rider v. Flynt	34/10/22	Remitted to \$950,000	Kim T. Spirito Attorney for Defendant
2,014,281	Perrotti v. Syntex Laboratories, Inc.	34/15/22	Denied	Jury Verdicts Weekly
2,000,000	Signal Carousel Apartments v. Imperial Bank	34/14/28	Denied	Jury Verdicts Weekly
2,000,000	Kinzel v. Messieh	33/38/23	Denied	Jury Verdicts Weekly
2,000,000	Bacciocco v. Myers	33/32/04	No motion filed	Jury Verdicts Weekly
2,000,000	Jackson v. GAB Business Service, Inc.	33/37/25	Remitted to \$1,000,000	David J. Prager Attorney for Defendant
2,000,000	Nutri-Metrics v. Gigi Enterprises	34/2/25	Denied	Jury Verdicts Weekly

B29

<u>Amount</u>	<u>Case Name</u>	<u>Jury Verdicts</u> Weekly <u>Vol./No./Pg.</u>	<u>Result of</u> New Trial Motion Re: Punitive Damages	<u>Source for</u> Result
1,538,000	Ertel v. Kersenbrok	34/11/26	Settled prior to filing motion	Ellis J. Horvitz
1,060,910	Will v. United Pacific Ins. Co.	33/41/29	Denied	Attorney for Defendant
1,000,000	Mack v. Pepperidge Farm, Inc.	34/10/30	Denied	Jury Verdicts Weekly
1,000,000	Bourn v. Farmers Ins. Group	33/36/25	Granted	Jury Verdicts Weekly
1,000,000	Tinnahan Consultants, Inc. v. Bank of America	33/20/6	JNOV granted	Jury Verdicts Weekly

~~1989~~ - 1 - 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF
THE AMERICAN INSTITUTE OF ARCHITECTS,
THE AMERICAN TORT REFORM ASSOCIATION,
THE COUNCIL OF COMMUNITY BLOOD CENTERS,
GENERAL ELECTRIC COMPANY,
THE MINNESOTA CIVIL JUSTICE COALITION,
THE NATIONAL SCHOOL BOARDS ASSOCIATION,
AND THE TEXAS CIVIL JUSTICE LEAGUE
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

BENJAMIN W. HEINEMAN, JR.
PHILIP A. LACOVARA
GENERAL ELECTRIC COMPANY
3135 Easton Turnpike
Fairfield, CT 06431
(203) 373-2492

MARTIN F. CONNOR
AMERICAN TORT REFORM
ASSOCIATION
1212 New York Avenue, N.W.
Washington, D.C. 20005
(202) 682-1163

THOMAS SCHMIDT
MINNESOTA CIVIL JUSTICE
COALITION
4700 IDS Center
Minneapolis, MN 55402
(612) 330-3000

REX E. LEE
CARTER G. PHILLIPS *
LOREEN M. MARCIL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for the Amici Curiae

June 1, 1990

* Counsel of Record

QUESTION PRESENTED

Amici curiae will address the following issue:

Whether the emergence, for the first time, of punitive damage awards that are excessive by the standards of contemporary society provides a substantial basis for this Court to scrutinize extreme punitive jury verdicts under the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page	
QUESTION PRESENTED	i	
TABLE OF AUTHORITIES	v	
INTEREST OF THE <i>AMICI</i>	1	
INTRODUCTION AND SUMMARY OF ARGUMENT..	3	
ARGUMENT	6	
<p>THE APPLICATION OF CONSTITUTIONAL LIMITS TO PUNITIVE DAMAGES IS NOW AP- PROPRIATE BECAUSE THOSE DAMAGES ARE BEING AWARDED AT A FREQUENCY AND IN AMOUNTS THAT ARE ARBITRARY, UNPRECE- DENTED AND, BY HISTORICAL STANDARDS, EXCESSIVE</p>		6
<p>A. From The Eighteenth Through The Mid- Twentieth Centuries, Punitive Damages Were Awarded As Redress For Limited Categories Of Torts And In Limited Amounts</p>		6
<p>1. English Law</p>		6
<p>2. Early American Law</p>		9
<p>B. The Frequency And Size Of Punitive Damage Awards Have Exploded In Recent Years</p>		17
<p>1. Changes in Legal Doctrine</p>		17
<p>a. Contract</p>		17
<p>b. Product Liability</p>		19
<p>c. Mass Torts</p>		20
<p>d. Standard of Liability</p>		21
<p>2. The Growth in Frequency and Size of Awards</p>		21

TABLE OF CONTENTS—Continued

	Page
a. Frequency of Punitive Damage Awards..	24
b. Size of Punitive Damage Awards	26
C. Punitive Damage Awards Are Subject To Review Under The Fourteenth Amendment And The Award In This Case Was Arbitrary And Excessive	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page
<i>Baltimore & O. R.R. v. Blocher</i> , 27 Md. 277 (1867) ..	11
<i>Bankers Life & Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988)	29
<i>Barlow v. Lowder</i> , 35 Ark. 492 (1880)	10, 13
<i>Barnes v. Martin</i> , 15 Wis. 240 (1862)	11
<i>Bass v. Chicago & N.W. Ry.</i> , 39 Wis. 636 (1876)	11, 13
<i>Beardmore v. Carrington</i> , 95 Eng. Rep. 790 (C.P. 1764)	7, 8, 9
<i>Benaway v. Conyne</i> , 3 Pin. 196 (Wis. 1851)	11, 13
<i>Benson v. Frederick</i> , 97 Eng. Rep. 1130 (K.B. 1766)	7
<i>Berry v. Vreeland</i> , 21 N.J.L. 183 (1847)	12
<i>Bodwell v. Osgood</i> , 20 Mass. (3 Pick.) 379 (1825) ..	11
<i>Borland v. Barrett</i> , 76 Va. 128 (1882)	11
<i>Bodshaw v. Buchanan</i> , 50 Tex. 492 (1878)	12
<i>Brown v. Allen</i> , 35 Iowa 306 (1872)	12
<i>Browning-Ferris Indus. v. Kelco Disposal, Inc.</i> , 109 S.Ct. 2909 (1989)	29
<i>Buckley v. Knapp</i> , 48 Mo. 152 (1871)	11
<i>Caldwell v. New Jersey Steamboat Co.</i> , 47 N.Y. 282 (1872)	15
<i>Cameron v. Bryan</i> , 89 Iowa 214 (1893)	11
<i>Cessna Aircraft Co. v. Fidelity & Casualty Co.</i> , 616 F. Supp. 671 (D.N.J. 1985)	19
<i>Clark v. Bales</i> , 15 Ark. 452 (1855)	12
<i>Cole v. Tucker</i> , 6 Tex. 266 (1851)	12
<i>Commercial Cotton Co. v. United California Bank</i> , 163 Cal. App.3d 511, 209 Cal. Rptr. 551 (1985) ..	18
<i>Corwin v. Watson</i> , 18 Mo. 71 (1853)	11
<i>Cook v. Hill</i> , 5 N.Y. Sup. Ct. 341 (1849)	11
<i>Coryell v. Colbaugh</i> , 1 N.J.L. 77 (1791)	10, 11, 13
<i>Cracker v. Chicago & N.W. Ry.</i> , 36 Wis. 657 (1875)	11, 13
<i>Day v. Woodworth</i> , 54 U.S. (13 How.) 363 (1852) ..	10, 16
<i>Dennison v. Hyde</i> , 6 Conn. 508 (1827)	12
<i>Dibble v. Morris</i> , 26 Conn. 416 (1857-58)	12
<i>Dillon v. Rogers</i> , 36 Tex. 152 (1871-72)	12
<i>Dorsey v. Honda Motor Co.</i> , 655 F.2d 650 (5th Cir. 1981), cert. denied, 459 U.S. 880 (1982)	19

TABLE OF AUTHORITIES—Continued

	Page
<i>Dorsey v. Manlove</i> , 14 Cal. 553 (1860)	12
<i>Drohn v. Brewer</i> , 77 Ill. 280 (1875)	11
<i>Duberley v. Gunning</i> , 100 Eng. Rep. 1226 (K.B. 1792)	7, 8, 9
<i>Duncan v. Record Publishing Co.</i> , 145 S.C. 196, 143 S.E. 31 (1927)	16
<i>Earl v. Tupper</i> , 45 Vt. 275 (1873)	11
<i>Edwards v. Beach</i> , 3 Day 447 (Conn. 1809)	12
<i>EKE Builders, Inc. v. Quail Bluff Assocs.</i> , 714 P.2d 604 (Okla. Ct. App. 1985)	18
<i>Ellis v. Brockton Publishing Co.</i> , 198 Mass. 538 (1908)	11
<i>Fay v. Parker</i> , 53 N.H. 342 (1872)	11
<i>Forty Exchange Co. v. Cohen</i> , 125 Misc.2d 475, 479 N.Y.S.2d 628 (N.Y. Civ. Ct. 1984)	18
<i>Gaither v. Blowers</i> , 11 Md. 536 (1857)	11
<i>Gillham v. Admiral Corp.</i> , 523 F.2d 102 (6th Cir. 1975), <i>cert. denied</i> , 424 U.S. 913 (1976)	19
<i>Gilreath v. Allen</i> , 32 N.C. (10 Ired.) 67	11
<i>Goddard v. Grand Trunk Ry. of Can.</i> , 57 Me. 202 (1869)	13
<i>Goetz v. Ambs</i> , 27 Mo. 28 (1858)	11
<i>Green v. Southern Express Co.</i> , 41 Ga. 515 (1871) ..	11
<i>Grey v. Jones</i> , 95 Eng. Rep. 794 (C.P. 1764)	7
<i>Gruenberg v. Aetna Ins. Co.</i> , 9 Cal. 3d 566, 510 P.2d 1032 (1973)	18
<i>Hamlin v. Spaulding</i> , 27 Wis. 360 (1869)	11
<i>Hoadley v. Watson</i> , 45 Vt. 289 (1873)	11
<i>Hodder v. Goodyear Tire & Rubber Co.</i> , 426 N.W. 2d 826 (Minn. 1988), <i>cert. denied</i> , 109 S.Ct. 3265 (1989)	20
<i>Huber v. Teuber</i> , 10 D.C. (3 MacArth.) 484 (1877-79)	11, 16
<i>Huckle v. Money</i> , 95 Eng. Rep. 768 (C.P. 1763)	6
<i>Humphries v. Johnson</i> , 20 Ind. 190 (1863)	12
<i>Huntley v. Bacon</i> , 15 Conn. 267 (1842)	12
<i>In re A.H. Robins Co.</i> , 85 B.R. 373 (E.D. Va. 1988), <i>cert. denied</i> , 110 S.Ct. 376 (1989)	20

TABLE OF AUTHORITIES—Continued

	Page
<i>Kane v. Johns-Manville Corp.</i> , 843 F.2d 636 (2d Cir. 1988)	20
<i>Kelly v. McDonald</i> , 39 Ark. 387 (1882)	12
<i>Lake Shore & Mich. S. Ry. v. Prentice</i> , 147 U.S. 101 (1893)	11, 12
<i>Leith v. Pope</i> , 96 Eng. Rep. 777 (C.P. 1799)	7, 8
<i>Linsley v. Bushnell</i> , 15 Conn. 225 (1842)	11, 16
<i>Livesley v. Stock</i> , 281 Pac. 70 (Cal. 1929)	16
<i>Louisville & N.R.R. v. Ballard</i> , 85 Ky. 307, 3 S.W. 530 (1887)	11, 13
<i>Lucas v. Michigan Cent. R.R.</i> , 98 Mich. 1 (1893) ..	11, 13
<i>Lynd v. Picket</i> , 7 Minn. 184 (1862)	12
<i>Lyon v. Hancock</i> , 35 Cal. 372 (1868)	10
<i>McAulay v. Birkhead</i> , 35 N.C. (13 Ired.) 28 (1851)	11
<i>McCarthy v. Niskern</i> , 22 Minn. 90 (1875)	13
<i>McIntyre v. Sholty</i> , 121 Ill. 660 (1887)	11
<i>McNamara v. King</i> , 7 Ill. 432 (1845)	11
<i>Meibus v. Dodge</i> , 38 Wis. 300 (1875)	11
<i>Merrills v. Tariff Mfg. Co.</i> , 10 Conn. 384	12
<i>Milwaukee & St. P.R.R. v. Arms</i> , 91 U.S. 489 (1876)	10
<i>Missouri Pac. R.R. v. Humes</i> , 115 U.S. 512 (1885) ..	10
<i>Moore v. Jewel Tea Co.</i> , 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), <i>aff'd</i> , 46 Ill. 2d 288, 263 N.E. 2d 103 (1970)	19
<i>Moore v. Remington Arms Co.</i> , 100 Ill. App. 3d 1102, 427 N.E. 2d 608 (1981)	22
<i>Moore v. Withenburg</i> , 13 La. Ann. 22 (1858)	12
<i>New Orleans, J. & Great N.R.R. v. Allbritton</i> , 38 Miss. 242 (1859)	15
<i>New Orleans, J. & Great N.R.R. v. Hurst</i> , 36 Miss. 660 (1859)	14
<i>Nicholson v. United Pac. Ins. Co.</i> , 710 P.2d 1342 (Mont. 1985)	18
<i>Nightingale v. Scannell</i> , 18 Cal. 315 (1861)	12
<i>North v. Cates</i> , 5 Ky. 591 (1812)	12
<i>Nossaman v. Rickert</i> , 18 Ind. 350 (1862)	11, 13
<i>O'Gilvie v. Int'l Playtex, Inc.</i> , 821 F.2d 1438 (10th Cir. 1987), <i>cert. denied</i> , 486 U.S. 1032 (1988)	19

TABLE OF AUTHORITIES—Continued

	Page
<i>Parsons v. Harper</i> , 57 Va. 64 (1860)	11, 13
<i>Pastorius v. Fisher</i> , 1 Rawle 27 (Pa. 1828)	12
<i>Pendleton v. Davis</i> , 46 N.C. (1 Jones) 98 (1853)	11
<i>Pickett v. Crook</i> , 20 Wis. 358 (1866)	11
<i>Pike v. Dilling</i> , 48 Me. 539 (1861)	11
<i>Porter v. Seiler</i> , 23 Pa. 424 (1854)	11
<i>Roberts v. Mason</i> , 10 Ohio St. 277 (1859)	11
<i>Roginsky v. Richardson-Merrell, Inc.</i> , 378 F.2d 832 (2d Cir. 1967)	20
<i>Rookes v. Barnard</i> , 1 All E.R. 367 (H.L. 1964)	7, 9
<i>Rosener v. Sears, Roebuck & Co.</i> , 110 Cal. App. 3d 740, 168 Cal. Rptr. 237 (1980), <i>app. dismissed</i> , 450 U.S. 1051 (1981)	22
<i>Schindel v. Schindel</i> , 12 Md. 108 (1858)	12
<i>Schlencker v. Risley</i> , 4 Ill. 483 (1842)	11
<i>Seaman v. Dexter</i> , 96 Conn. 334, 114 A. 75 (1921) ..	16
<i>Sharpe v. Brice</i> , 96 Eng. Rep. 557 (C.P. 1774)	7, 8
<i>Sheik v. Hobson</i> , 64 Iowa 146 (1884)	11
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	9, 10, 21
<i>Southern Kan. Ry. v. Rice</i> , 38 Kan. 398 (1888)	11, 13
<i>Stambaugh v. Int'l Harvester Co.</i> , 102 Ill. 2d 250, 464 N.E. 2d 1011 (1984)	20
<i>Taber v. Hutson</i> , 5 Ind. 322 (1854)	11, 13
<i>Taylor v. Giger</i> , 3 Ky. 586 (1808)	12
<i>Tetuan v. A.H. Robins Co.</i> , 241 Kan. 441, 738 P.2d 1210 (1987)	20
<i>Thomas v. Isett</i> , 1 Greene 470 (Iowa 1843)	12
<i>Toole v. Richardson-Merrell, Inc.</i> , 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967)	19
<i>Treat v. Barber</i> , 7 Conn. 274 (1828)	12
<i>Tullidge v. Wade</i> , 95 Eng. Rep. 909 (C.P. 1769)	7
<i>Ward v. Blackwood</i> , 41 Ark. 295 (1883)	10, 13
<i>Welch v. Durand</i> , 36 Conn. 182 (1869)	11
<i>Wheeler & Wilson Mfg. Co. v. Boyce</i> , 36 Kan. 350 (1887)	11
<i>Whipple v. Walpole</i> , 10 N. H. 130 (1839)	11
<i>Whitfield v. Whitfield</i> , 40 Miss. 352 (1866)	12
<i>Wilkes v. Wood</i> , 98 Eng. Rep. 489 (C.P. 1763)	6

TABLE OF AUTHORITIES—Continued

	Page
<i>Wilkinson v. Drew</i> , 75 Me. 360 (1883)	12
<i>Worford v. Isbel</i> , 4 Ky. 247 (1808)	11
<i>Vunck v. Hull</i> , 3 N.J.L. 814 (1809)	11
<i>Constitutional Provisions</i>	
U.S. Const. amend. XIV	<i>passim</i>
<i>Other Authorities</i>	
R. Bauer, <i>Essentials of the Law of Damages</i> (1919)	10
Comment, <i>Bad Faith Revisited: An Examination</i> <i>of Tort Law Remedies for Commercial Contract</i> <i>Disputes</i> , 34 Kan. L. Rev. 315 (1985)	19
Comment, <i>Punitive Damages and the Eighth</i> <i>Amendment: An Analytical Framework for De-</i> <i>termining Excessiveness</i> , 75 Calif. L. Rev. 1433 (1987)	21
Comment, <i>Sailing the Uncharted Seas of Bad</i> <i>Faith: Seaman's Direct Buying Service, Inc. v.</i> <i>Standard Oil Co.</i> , 69 Minn. L. Rev. 1161 (1985) ..	18
Comment, <i>The Expanding Availability of Punitive</i> <i>Damages in Contract Actions</i> , 8 Ind. L. Rev. 668 (1975)	19
J. Deering, <i>The Law of Negligence</i> (1886)	14
DuBois, <i>Punitive Damages: Bonanza or Disaster?</i> 3 Litigation 35 (1976)	21, 22
Ellis, <i>Fairness and Efficiency in the Law of Puni-</i> <i>tive Damages</i> , 56 S. Cal. L. Rev. 1 (1982)	7, 8, 17
G. Field, <i>A Treatise on the Law of Damages</i> (1876)	10, 16
Foster Nat. Gas Rep. No. 1702 (Foster Assocs. Dec. 15, 1988)	19
S. Greenleaf, <i>A Treatise on the Law of Evidence</i> (S. Crosswell 14th rev. ed. 1883)	9, 14, 16
P. Huber, <i>Liability: The Legal Revolution and Its</i> <i>Consequences</i> (1988)	<i>passim</i>
Jeffries, <i>A Comment on the Constitutionality of</i> <i>Punitive Damages</i> , 72 Va. L. Rev. 139 (1986)	20, 22

TABLE OF AUTHORITIES—Continued

	Page
Landes & Posner, <i>New Light on Punitive Damages</i> , Reg., Sept.-Oct. 1986	25
Levit, <i>Punitive Damages: Yesterday, Today and Tomorrow</i> , Ins. L. J., May 1980	16, 22
J. McCarthy, <i>Punitive Damages in Bad Faith Cases</i> (3d ed. 1983)	19
McCormick, <i>Some Phases of the Doctrine of Exemplary Damages</i> , 8 N.C.L. Rev. 129 (1930)	8, 14, 16
Morrison, <i>Punitive Damages and Why The Reinsurer Cares</i> , 20 The Forum 73 (1984)	22
National Association of Independent Insurers, <i>Punitive Damages and the Civil Justice System</i> (1985)	21
Note, <i>Contort: Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance Commercial Contracts—Its Existence and Desirability</i> , 60 Notre Dame L. Rev. 510 (1985)	18
Note, <i>Exemplary Damages in the Law of Torts</i> , 70 Harv. L. Rev. 517 (1957)	9, 15
Note, <i>The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishments</i> , 1984 U. Ill. L. F. 153	22
Owen, <i>Problems in Assessing Punitive Damages Against Manufacturers of Defective Products</i> , 49 U. Chi. L. Rev. 1 (1982)	19, 22, 26
Peterson, Sharma & Shanley, <i>Punitive Damages—Empirical Findings</i> (RAND R-3311-ICJ 1987)	passim
F. Pollock, <i>A Treatise on the Principle of Obligations Arising From Civil Wrongs in the Common Law</i> (New York ed. 1892)	13
Priest, <i>Punitive Damages and Enterprise Liability</i> , 56 S. Cal. L. Rev. 123 (1982)	21, 26
<i>Punitive Damages: A Constructive Examination</i> , Report of the Special Committee on Punitive Damages of the American Bar Association Section on Litigation (1986)	18, 22
K. Redden, <i>Punitive Damages</i> (1980)	7, 8, 15
<i>Restatement (Second) of Contracts</i> (1981)	17

TABLE OF AUTHORITIES—Continued

	Page
Rheingold, <i>The MER/29 Story—An Instance of Successful Mass Disaster Litigation</i> , 56 Calif. L. Rev. 116 (1968)	20
Sales & Cole, <i>Punitive Damages: A Relic That Has Outlived Its Origins</i> , 37 Van. L. Rev. 1117 (1984)	19, 22
Schulkin, <i>Mass Liability and Punitive Damages Overkill</i> , 30 Hastings L. J. 1797 (1979)	22
Schwartz, <i>Deterrence and Punishment in the Common Law of Punitive Damages: A Comment</i> , 56 S. Cal. Rev. 133 (1982)	22
T. Sedgwick, <i>A Treatise on the Measure of Damages</i> (1847)	9, 15
T. Sedgwick, <i>A Treatise on the Measure of Damages</i> (A. Sedgwick & J. Beale 9th rev. ed. 1912) ..	9, 14, 16
Seltzer, <i>Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control</i> , 52 Fordham L. Rev. 37 (1983)	20
Shanley & Peterson, <i>Posttrial Adjustments to Jury Awards</i> (RAND R-3511-ICJ 1987)	27
T. Shearman & A. Redfield, <i>A Treatise on the Law of Negligence</i> (1869)	13
1 T. Street, <i>The Foundations of Legal Liabilities</i> (1906)	10, 16
Sullivan, <i>Punitive Damages in the Law of Contract: The Reality and Illusion of Legal Change</i> , 61 Minn. L. Rev. 207 (1977)	8
J.G. Sutherland, <i>A Treatise on the Law of Damages</i> (1883)	16
<i>Symposium Discussion</i> , 56 S. Cal. L. Rev. 155 (1982)	10, 21, 26
U.S. Tort Policy Working Group, <i>An Update on the Liability Crisis</i> (1987)	21, 26
F. Wharton, <i>A Treatise on the Criminal Law of the United States</i> (1852)	15
Wheeler, <i>The Constitutional Case for Reforming Punitive Damages Procedures</i> , 69 Va. L. Rev. 223 (1983)	20

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

**BRIEF OF
THE AMERICAN INSTITUTE OF ARCHITECTS,
THE AMERICAN TORT REFORM ASSOCIATION,
THE COUNCIL OF COMMUNITY BLOOD CENTERS,
GENERAL ELECTRIC COMPANY,
THE MINNESOTA CIVIL JUSTICE COALITION,
THE NATIONAL SCHOOL BOARDS ASSOCIATION,
AND THE TEXAS CIVIL JUSTICE LEAGUE
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

INTEREST OF THE *AMICI*

Amicus American Institute of Architects ("AIA") is a professional organization representing more than 56,000 architects in all 50 states. Through its 300 state and local chapters, the AIA strives to meet the needs and interest of the nation's architects and the public they serve by developing public awareness of the value of architecture and the importance of good design.

Amicus American Tort Reform Association ("ATRA"), formed in 1986, is a broad-based, bipartisan coalition of

approximately 400 nonprofits, professional societies, trade associations, large corporations and small businesses dedicated to bringing greater efficiency, fairness and predictability to the civil justice system.

Amicus Council of Community Blood Centers is an association of not-for-profit community-based blood centers which are responsible for over 25 percent of the nation's volunteer blood supply.

Amicus General Electric Company ("General Electric") is a diversified manufacturing, entertainment and financial services concern.

Amicus Minnesota Civil Justice Coalition ("MCJC") is comprised of business associations, professional groups, governmental associations and individual companies who believe that significant reform in the civil justice system is needed.

Amicus National School Boards Association ("NSBA") is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Amicus Texas Civil Justice League ("TCJL"), created in 1986, is a 2300 member organization of individuals, municipalities, associations and corporations in Texas who are concerned with the current state of the civil justice system.

It may not be self-evident what common reason these seven organizations have to file a brief in this case. But their shared interest arises from the fact that they have become in recent years acutely aware of the potentially catastrophic impact that the liability for punitive damages may have upon all potential tort defendants. The

three tort reform associations all were created within the last twelve years in response to widespread criticism of the civil justice system. Prior to that time, the tort system may have had flaws but they seemed manageable. That no longer is true and therefore organizations from all sectors of society have grown increasingly concerned about the impact of unrestricted jury awards.

For that reason AIA, the Council of Community Blood Centers, General Electric, MCJC, NSBA and TCJL, who together constitute a representative sample of ATRA's membership, have joined with ATRA in submitting a single brief. These organizations and their members now routinely face demands in civil litigation for multimillion dollar punitive damage awards, demands that simply were unheard of as recently as 20 years ago. *Amici* therefore wish to present their views to the Court concerning the dramatic changes that recently have occurred in the area of punitive damages. In particular, *amici* propose to demonstrate that changes in the law and practice of punitive damages now make constitutional scrutiny of punitive damage awards under the Fourteenth Amendment's Due Process Clause appropriate.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

In deciding whether and how to apply the Due Process Clause of the Fourteenth Amendment to an excessive and wholly arbitrary punitive damage award—as imposed upon petitioner by the jury in this case—one preliminary issue warrants extended consideration: Why should the Court now, for the first time in 200 years, scrutinize an award of punitive damages under the Due Process Clause of the Fourteenth Amendment? The answer is that the Court has not, until very recently, had occasion to consider whether punitive damage awards are subject to constitutional review. This is not because defendant's

¹ Pursuant to Rule 37 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

attorneys lacked imagination; it is because, historically, such awards were not arbitrary or excessive. Only recently have punitive damages been awarded at a level and in such an arbitrary manner as to warrant this Court's attention—a level and manner that would have been unimaginable to courts a generation ago, much less to the framers of the Constitution.

Punitive damages are today awarded with a frequency and in amounts that are startling. In certain categories of civil litigation, a third or more of the plaintiffs who prevail receive punitive awards. And these awards may be enormous: punitive verdicts exceeding \$1 million, while certainly not the norm, have become almost commonplace.

This system of punitive damages—where punitive awards are routine and fantastic verdicts receive little attention—is entirely a product of the last 20 years. For almost all of the nation's history, through the nineteenth and the first half of the twentieth centuries, punitive damages were largely reserved for the redress of torts that were viewed as especially offensive. When punitive damages were awarded, the amounts were quite small by present-day standards: the largest nineteenth century awards were worth approximately \$50,000 to \$60,000 in 1987 dollars. Such sums, while surely substantial, were neither noteworthy nor excessive in the terms of the day; they were, for example, in line with the civil and criminal fines imposed by nineteenth century legislatures for conduct similar to that giving rise to punitive verdicts.

Beginning about 1960, however, this regime of punitive damages underwent a dramatic transformation. The most comprehensive empirical study of punitive awards over time, conducted in San Francisco and Cook Counties by the RAND Institute for Civil Justice, found that the rate at which punitive damages were awarded increased in the two jurisdictions by almost 700% and almost

2000%, respectively, from the early 1960s to the early 1980s. The change in the size of punitive awards over the same period—viewed in constant dollars—was equally stunning. In San Francisco, the median punitive verdict increased by almost 400% and the average punitive award by more than 200%; in Cook County, the median punitive award increased by 4300% and the average by 10,000%. Indeed, in many jurisdictions the average punitive award now approaches or exceeds \$1 million.

In reciting these statistics, we do not mean to overstate the perils of the punitive damage system. Punitive awards are still not routine (in the sense that they do not accompany a majority of plaintiffs' verdicts), and million dollar punitive damage judgments are returned in only a small fraction of cases. But *any* punitive awards in the million dollar range are an entirely new phenomenon. Even taking into account the effects of inflation, today's largest punitive damage judgments are an order of magnitude larger than the grandest awards of the last century; million dollar awards were literally unheard of even a generation ago. More broadly, it is only in the last 20 years that juries have started to render punitive verdicts that dramatically exceed the size of the fines that legislatures consider appropriate punishment for similar misconduct.

Viewed against this background—through the prism of history—it is clear that petitioner is not propounding a novel constitutional theory when it contends that the Fourteenth Amendment's guarantees apply to the award of punitive damages. To the contrary, petitioner seeks only to apply well-settled Fourteenth Amendment principles to a newly emerging problem: the award of punitive damages that are excessive by the standards of contemporary society and completely arbitrary.

ARGUMENT

THE APPLICATION OF CONSTITUTIONAL LIMITS TO PUNITIVE DAMAGES IS NOW APPROPRIATE BECAUSE THOSE DAMAGES ARE BEING AWARDED AT A FREQUENCY AND IN AMOUNTS THAT ARE ARBITRARY, UNPRECEDENTED AND, BY HISTORICAL STANDARDS, EXCESSIVE.

A. From The Eighteenth Through The Mid-Twentieth Centuries, Punitive Damages Were Awarded As Redress For Limited Categories Of Torts And In Limited Amounts.

1. *English Law.* The doctrine of punitive damages in its current form—the idea that juries may award damages in tort that exceed the plaintiffs' tangible injuries—was first recognized by English courts in 1763. In *Wilkes v. Wood*, 98 Eng. Rep. 489, 498-499 (C.P. 1763), one of a pair of cases decided that year invalidating searches and seizures under a general warrant, Chief Justice Pratt held that the jury could "give damages for more than the injury received." Suggesting that conduct "totally subversive of . . . liberty" may "aggravate damages" in an action against a Crown officer, the Chief Justice explained that damage awards in such cases may serve "not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."

Wilkes' companion case, *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), also involved oppressive conduct by a government officer.² The court in *Huckle* was the

² The Chief Justice explained that the jurors "saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them. . . . To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour." 95 Eng. Rep. at 769.

first to make use of the term "exemplary damages" in upholding an award that exceeded measurable harm to the plaintiff. See generally *Rookes v. Barnard*, 1 All E.R. 367, 407-08 (H.L. 1964) (Devlin); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 14 (1982).

These holdings were followed by decisions approving the award of punitive damages in a case of assault and battery where, although the injury was not severe, the plaintiff "ha[d] been used unlike a gentleman" (*Grey v. Jones*, 95 Eng. Rep. 794, 795 (C.P. 1764)); in an action where an officer ordered a common soldier whipped and the soldier, "though not much hurt indeed, was scandalized and disgraced by such a punishment" (*Benson v. Frederick*, 97 Eng. Rep. 1130 (K.B. 1766)); and in a suit for seduction of the plaintiff's daughter, which was deemed especially offensive because "the plaintiff . . . received this insult in his own house; where he had civilly received the defendant, and permitted him to make his addresses to his daughter" (*Tullidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1769)).³ Like the decisions involving invalid warrants, "all of these cases share one common attribute; they involved acts that resulted in direct affronts to the honor of the victims. The defendants' acts were insults that were likely to provoke reactions of outrage." Ellis, *supra*, 56 S. Cal. L. Rev. at 15. See K. Redden, *Punitive Damages*, § 2.2(A)(2) (1980).

³ Several other decisions from the same period upheld awards of damages that were not directly tied to the plaintiffs' tangible losses, although the rulings did not explicitly refer to a doctrine of exemplary damages. See *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764) (illegal search); *Sharpe v. Brice*, 96 Eng. Rep. 557 (C.P. 1774) (illegal search); *Leith v. Pope*, 96 Eng. Rep. 777 (C.P. 1799) (malicious prosecution, an offense that was particularly serious because it involved an accusation of a capital crime); *Duberley v. Gunning*, 100 Eng. Rep. 1226 (K.B. 1792) (criminal conversion).

Against the background of these cases, the scholarly consensus is that common law courts developed the doctrine of punitive damages in an attempt to rationalize damage awards that exceeded the plaintiff's tangible injury during a period when judges had grave doubts about their authority to set aside jury verdicts. See Ellis, *supra*, 56 S. Cal. L. Rev. at 12, 14; Sullivan, *Punitive Damages in the Law of Contract: The Reality and Illusion of Legal Change*, 61 Minn. L. Rev. 207, 214 (1977).⁴ At the same time, the award of punitive damages in cases of outrageous and insulting conduct allowed the jury to redress the plaintiff's humiliation and emotional distress in an era when those forms of injury generally were not compensable by the courts. Several of the early English cases, in fact, mingled the concepts of punishment and compensation, effectively concluding that the outrageous conduct of the defendant both necessitated and justified an "exemplary" award that would redress the plaintiff's intangible injuries. See K. Redden, *supra*, §§ 2.2(B) and 2.2(D); McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C.L.

⁴ Through the end of the eighteenth century, judges remained extremely reluctant to set aside jury verdicts; they opined that it was appropriate only when the award was "monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764). See *Sharpe v. Brice*, 96 Eng. Rep. 557 (C.P. 1774) ("in torts a greater latitude is allowed to the jury: and the damages must be expressed and outrageous to require or warrant a new trial"); *Leith v. Pope*, 96 Eng. Rep. 777, 778 (C.P. 1799) ("in cases of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury" (footnote omitted)); *Duberley v. Gunning*, 100 Eng. Rep. 1226, 1228 (K.B. 1792) ("[w]e have no right in such a case to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages").

Rev. 129, 132 (1930); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518-19 (1957).⁵

This, then, was the understanding of the jury's power to award nominally punitive damages at the time of the drafting of the Constitution and the Fifth Amendment. While the notion of civil punishment for certain forms of misconduct can be traced at least to the Magna Carta, the express recognition of the jury's power to award punitive damages in tort to a plaintiff was, in the late eighteenth century, quite new. It was confined to cases involving a narrow range of outrageous and insulting behavior. And it was exercised, at least in part, for purposes that modern courts would view as compensatory.

2. *Early American Law.* a. The jury's power to award punitive damages in tort suits was vigorously debated by American courts and commentators throughout the nineteenth century, and that power was rejected or limited in a number of jurisdictions. See *Smith v. Wade*, 461 U.S. 30, 35, 37 n.5 (1983) (citing cases); *id.* at 58 & n.2, 59 (Rehnquist, J., dissenting). Compare T. Sedgwick, *A Treatise on the Measure of Damages* 45-46 n.t. (1847) and 1 T. Sedgwick, *A Treatise on the Measure of Damages* § 349 (A. Sedgwick & J. Beale 9th rev. ed. 1912) (accepting doctrine) with 2 S. Greenleaf, *A Trea-*

⁵ The courts explained that "[t]here is great difference between cases of damages which be certainly seen, and such as are ideal, as between assumpsit, trespass for goods, where the sum and value may be measured, and actions of imprisonment, malicious prosecution, slander, and other personal torts, where the damages are matter of opinion, speculation, ideal." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 792 (C.P. 1764). In the latter class of torts, "where the damages depend upon mere sentiment and opinion, the Courts have no line to go by; and therefore it would be very dangerous for [judges] to interfere." *Duberley v. Gunning*, 100 Eng. Rep. 1226, 1228 (K.B. 1792). Indeed, Lord Devlin was of the view that, with the exception of cases involving oppressive government conduct, all of the early English decisions could be explained as instances of "aggravated damages"—that is, real but intangible damages. See *Rookes, supra*, 1 All E.R. at 412.

tise on the Law of Evidence § 253 (S. Croswell 14th rev. ed. 1883) (rejecting doctrine). See generally 1 T. Street, *The Foundations of Legal Liability* 478-82 (1906); G. Field, *A Treatise on the Law of Damages* 65-66 (1876). This Court, however, expressly recognized the propriety of punitive damage awards in 1852 (*Day v. Woodworth*, 54 U.S. (13 How.) 363, 399 (1852) (dictum)); a majority of state courts, many of which addressed the question in the latter half of the nineteenth century, followed suit. See note, *supra*, 70 Harv. L. Rev. at 518 n.3.

This Court extensively canvassed a portion of this history in *Smith v. Wade*, *supra*, exploring the state of mind required in the late nineteenth century to support an award of punitive damages. See 461 U.S. at 38-46; *id.* at 68-84 (Rehnquist, J., dissenting). But regardless of how the requisite mental state was described at the time, it is plain that punitive awards typically were granted only in the case of torts that were deemed especially offensive or that placed life and limb in danger. “[A]s a general rule,” this Court explained in 1876, “the plaintiff recovers merely” compensation for his injury. *Milwaukee & St. P. R.R. v. Arms*, 91 U.S. 489, 492 (1876) (emphasis in original). Accord *Missouri P. R.R. v. Humes*, 115 U.S. 512, 521 (1885). In contrast, until well into the twentieth century, punitive damages were available in the United States only in a “comparatively small class of torts” (T. Street, *supra*, at 479)—those involving what the earliest American decisions described as conduct “of the most atrocious and dishonorable nature.” *Coryell v. Colbaugh*, 1 N.J.L. 77, 91 (1791). See R. Bauer, *Essentials of the Law of Damages* § 47 (1919).

For the most part, these offenses were “dignitary torts,” principally “the traditional intentional torts.” *Symposium Discussion*, 56 S. Cal. L. Rev. 155, 156 (1982) (remarks of Prof. Ellis). They included assault and battery,⁶ false

⁶ See, e.g., *Barlow v. Lowder*, 35 Ark. 492 (1880); *Ward v. Blackwood*, 41 Ark. 295 (1883); *Lyon v. Hancock*, 35 Cal. 372 (1868);

imprisonment,⁷ libel and slander,⁸ seduction,⁹ conduct amounting to reckless endangerment,¹⁰ and flagrant cases

Welch v. Durand, 36 Conn. 182 (1869); *Huber v. Tueber*, 10 D.C. (3 MacArth.) 484 (1877-79); *Green v. Southern Express Co.*, 41 Ga. 516 (1871); *Drohn v. Brewer*, 77 Ill. 280 (1875); *McIntyre v. Sholty*, 121 Ill. 660 (1887); *McNamara v. King*, 7 Ill. 432 (1845); *Nossaman v. Rickert*, 18 Ind. 350 (1862); *Taber v. Hutson*, 5 Ind. 322 (1854); *Southern Kan. Ry. v. Rice*, 38 Kan. 398 (1888); *Worford v. Isbel*, 4 Key. 247 (1808); *Pike v. Dilling*, 48 Me. 539 (1861); *Baltimore & O. R.R. v. Blocher*, 27 Md. 277 (1867); *Gaither v. Blowars*, 11 Md. 536 (1857); *Lucas v. Michigan Cent. R.R.*, 98 Mich. 1 (1893); *Corwin v. Watson*, 18 Mo. 71 (1853); *Goetz v. Ambbs*, 27 Mo. 28 (1858); *Fay v. Parker*, 53 N.H. 342 (1872); *Pendleton v. Davis*, 46 N.C. (1 Jones) 98 (1853); *Roberts v. Mason*, 10 Ohio St. 277 (1859); *Porter v. Seiler*, 23 Pa. 424 (1854); *Earl v. Tupper*, 45 Vt. 275 (1873); *Hoadley v. Watson*, 45 Vt. 289 (1873); *Borland v. Barrett*, 76 Va. 128 (1882); *Barnes v. Martin*, 15 Wis. 240 (1862); *Bass v. Chicago & N.W. Ry.*, 39 Wis. 636 (1876); *Cracker v. Chicago & N.W. Ry.*, 36 Wis. 657 (1875).

⁷ See, e.g., *Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101 (1893); *Green v. Southern Express Co.*, 41 Ga. 515 (1871); *Schlencker v. Risley*, 4 Ill. 483 (1842); *Taber v. Hutson*, 5 Ind. 322 (1854); *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350 (1887); *Parsons v. Harper*, 57 Va. 64 (1860); *Hamlin v. Spaulding*, 27 Wis. 360 (1869).

⁸ See, e.g., *Louisville & N.R.R. v. Ballard*, 85 Ky. 307, 3 S.W. 530 (1887); *Sheik v. Hobson*, 64 Iowa 146 (1884); *Bodwell v. Osgood*, 20 Mass. (3 Pick.) 379 (1825); *Ellis v. Brockton Publishing Co.*, 198 Mass. 538 (1908); *Buckley v. Knapp*, 48 Mo. 152 (1871); *Vunck v. Hull*, 3 N.J.L. 814 (1809); *Cook v. Hill*, 5 N.Y. Sup. Ct. 341 (1849); *Gilreath v. Allen*, 32 N.C. (10 Ired.) 67 (1849); *Benaway v. Conyne*, 3 Pin. 196 (Wis. 1851).

⁹ *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791); *McAulay v. Birkhead*, 35 N.C. (13 Ired.) 28 (1851).

¹⁰ See, e.g., *Linsley v. Bushnell*, 15 Conn. 225 (1842) (personal injury and property damage caused by overturned cart intentionally left on public highway); *Cameron v. Bryan*, 89 (Iowa) 214 (1893) (personal injury caused by attack by dog); *Whipple v. Wapole*, 10 N.H. 130 (1839) (property damage and personal injury caused by poorly maintained bridge); *Meibus v. Dodge*, 38 Wis. 300 (1875) (personal injury caused by attack by vicious dog); *Pickett v. Crook*, 20 Wis. 358 (1866) (personal injury caused by roaming ram).

was confined to the categories of tort described above. In particular, with the exception of actions for breach of contract to marry—suits that plainly have a strong dignitary component (see McCormick, *supra*, 8 N.C.L. Rev. at 137, 141)—punitive damages were emphatically not permitted in contract actions. See *id.* at 40.¹⁴

b. The most striking aspect of punitive damage awards during the first 150 years of the nation's history is their size: by modern standards, the awards were remarkably small. The largest punitive damage award that we uncovered in an extensive (although necessarily non-exhaustive) study of nineteenth century law—including punitive awards that were set aside as excessive—was \$4,500.¹⁵ This sum, worth approximately \$58,000 in 1987 dollars, remains quite small by present-day standards when adjusted for inflation. (We used data provided by the Bureau of Labor Statistics' Consumer Price Index to convert the nineteenth century figure into 1987 dollars). Most punitive awards, even those involving serious injuries, were much smaller.¹⁶ Indeed, so far as

¹⁴ The nineteenth century saw only one significant extension of liability for punitive damages beyond the field of intentional torts: such damages were allowed in actions alleging a breach of duty on the part of common carriers (particularly railroads) and public utilities. Decisions involving such liability, which Dean McCormick believed were related to the punitive damages action for oppressive conduct by public officers (see McCormick, *supra*, 8 N.C.L. Rev. at 138), often themselves involved insult or other aggravating circumstances. And they rested on the understanding that the defendants had assumed special obligations to the public, particularly concerning personal safety. See J. Deering, *The Law of Negligence* § 415 (1886); 2 S. Greenleaf, *supra*, at 263 n.a; T. Sedgwick (9th rev. ed. 1912), *supra*, at § 371a.

¹⁵ *New Orleans, J. & Great N.R.R. v. Hurst*, 36 Miss. 660 (1859).

¹⁶ Many of the reported decisions discussing punitive damages fail to disclose the punitive amounts that were either sought or awarded. It is likely, however, that the larger—and therefore more noteworthy—awards were specified. A listing of those cases noting damage amounts is contained in Appendix A.

we were able to determine, the largest nineteenth century award that combined punitive and compensatory damages was \$20,000. Because that award (and others of similar magnitude) involved a serious injury,¹⁷ the compensatory portion was presumably large.¹⁸ Not only are the reported awards not excessive on their face, but the sums were in line with the contemporary fines set by statute for the type of conduct that gave rise to the punitive jury verdicts and therefore not arbitrary.¹⁹

Even these amounts overstate the damages that were awarded for what modern courts would regard as punitive purposes. During the first half of the nineteenth century, damages were generally unavailable as compensation for pain, humiliation and other forms of intangible injury, and consequential damages were restricted as well. See, e.g., T. Sedgwick, *supra*, at 35-37 (1847). As in England, exemplary damages were used during this period to fill the gap. See K. Redden, *supra*, § 2.3(A); Note, *supra*, 70 Harv. L. Rev. at 519-20. Later in the century the difficulty of measuring the value of interests such as reputation led courts to label as "exemplary" many damage awards that now would be viewed as compensatory.²⁰ Courts also occasionally awarded nominally

¹⁷ *Caldwell v. New Jersey Steamboat Co.*, 47 N.Y. 282-283 (1872) (award of \$20,000 in combined compensatory and punitive damages to plaintiff passenger who was "maimed and crippled for life" by an exploding steamboat boiler).

¹⁸ Many of the reported decisions identify only the combined total of punitive and compensatory damages. Even so, the numbers involved were notably small. See cases cited at Appendix A.

¹⁹ See, e.g., F. Wharton, *A Treatise on the Criminal Law of the United States* (1852) (citing statutes) (fines for assault and battery ranging from \$500-\$3,000; fines for malicious mischief of up to \$1,000; fines for seduction of up to \$5,000); *New Orleans, J. & Great N.R.R. v. Allbritton*, 38 Miss. 242 (1859) (citing \$10,000 statutory fine for reckless operation of a railroad).

²⁰ Thus, this Court explained at mid-century that "[i]n many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money stan-

punitive damages to cover the plaintiff's costs of litigation, although this Court in *Day v. Woodworth*, *supra*, disapproved such awards in the federal courts. See McCormick, *supra*, at 148 & n.108; *Linsley v. Bushnell*, 15 Conn. 225 (1842-43).

The size of punitive damage awards did not increase dramatically in the first half of this century. Writing in 1930, Dean McCormick noted what he described as several "startlingly large verdicts of punitive damages"—one for \$50,000, one for \$33,333.33 (reduced to \$10,000), and one for \$12,650 (reduced by \$5000).²¹ While these sums certainly were significant amounts of money at the time—the largest was worth some \$332,000 in 1987 dollars, an amount that includes compensatory damages for libel—they would startle no one today. Indeed, in 1955, at the dawn of the modern punitive damages era, an award of \$75,000 was the largest punitive damages verdict in California history and one of the two largest in the history of the United States. Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, Ins. L.J., May 1980, at 257, 259 (1980).

In sum, punitive damages played a relatively small role in this country's legal system through the first half

dard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory." *Day*, 54 U.S. (13 How.), at 399. See *Huber v. Teuber*, 10 D.C. (3 MacArth.) 484, 498 (1877-79) ("injury done may be aggravated by wanton violation of the rights of others, by malice, or revenge without cause, resulting in a species of injury whose effects can neither be calculated nor compensated"). See generally G. Field, *supra*, at §§ 73-75; 3 J.G. Sutherland, *A Treatise on the Law of Damages*, 726-35 (1883); 2 S. Greenleaf, *supra* at 256-57 n.2; T. Sedgwick, *supra*, at § 353 (9th rev. ed. 1912); T. Street, *supra*, at 480.

²¹ McCormick, *supra*, 8 N.C.L. Rev. at 149 & n. 114, citing *Duncan v. Record Publishing Co.*, 145 S.C. 196, 143 S.E. 31 (1927); *Livesley v. Stock*, 281 Pac. 70 (Cal. 1929); *Seaman v. Dexter*, 96 Conn. 334, 114 A. 75 (1921).

of the twentieth century. Such damages were awarded in limited circumstances, in part for purposes of compensation, and in amounts that were not noteworthy by the standards of the time. During this period, as commentators have observed, "punitive damage awards proved exceptionally rare" (P. Huber, *supra* at 119) and, when awarded, were modest.

B. The Frequency And Size Of Punitive Damage Awards Have Exploded In Recent Years.

In the past, as we have shown, the award of punitive damages "merited scant attention. Punitive damages were rarely assessed and likely to be small in amount." Ellis, *supra*, 56 S. Cal. L. Rev. at 2. In the last 30 years, however, and particularly since 1970, that situation has changed dramatically. Punitive damages are now awarded with a frequency and in amounts that are without precedent. In part, this development is attributable to changes in the law that have made punitive damages available for the first time in several existing causes of action, and have given those damages a prominent role in new types of lawsuits. The increased availability of punitive damages also is undoubtedly rooted in shifting societal attitudes that have made juries ever more willing to assess ever larger punitive judgments. But whatever the underlying cause, the result has been the development of a regime of punitive damages that is entirely unlike the one that existed throughout almost all of the nation's history.

1. *Changes in Legal Doctrine.* The shifts in the law affecting punitive damages have not been sudden or dramatic. Since 1960, however, there has been an evolution in several areas that, in combination, has had significant consequences.

a. *Contract.* The black letter rule today, as it has been for 200 years, is that punitive damages are not available for breach of contract. See Restatement (Sec-

ond) of Contracts § 355 (1981). Beginning in the 1960s, however, many courts, led by those in California, have permitted the awarding of punitive damages for the bad faith breach of insurance contracts; punishment has been deemed appropriate for violation of the "covenant of good faith" that the courts have implied in such contracts. See, e.g., *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 575, 510 P.2d 1032, 1037 (1973). This bad faith action is now allowed "in a majority of jurisdictions." *Punitive Damages: A Constructive Examination*, Report of the Special Committee on Punitive Damages of the American Bar Association Section on Litigation 5-2, 5-3 (1986) (herein cited as "ABA"). Indeed, "[i]nsurance bad faith litigation has become a field of its own, with numerous treatises and case law reporters." *Id.* at 5-4.

Punitive damage awards for breach of contract are not limited to the insurance area; "a significant minority of jurisdictions have extended the action to other kinds of contract cases." *Id.* at 5-4. Several jurisdictions, for example, have recognized a tort action—and therefore have found punitive damages available—for the breach of consumer contracts.²² Other states have recognized at least the possibility that a covenant of good faith (for whose violation punitive damages may be awarded) is present in virtually all contracts.²³ See ABA 5-4, 5-5. Taken

²² See Comment, *Sailing the Uncharted Seas of Bad Faith: Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 69 Minn. L. Rev. 1161 (1985); Note, *Contort: Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance Commercial Contracts—Its Existence and Desirability*, 60 Notre Dame L. Rev. 510, 528 n.104 (1985).

²³ See, e.g., *Commercial Cotton Co. v. United California Bank*, 163 Cal. App.3d 511, 209 Cal. Rptr. 551 (1985); *Nicholson v. United Pac. Ins. Co.*, 710 P.2d 1342 (Mont. 1985); *Forty Exchange Co. v. Cohen*, 125 Misc.2d 475, 479 N.Y.S.2d 628, 639-40 (N.Y. Civ. Ct. 1984); *EKE Builders, Inc. v. Quail Bluff Assocs.*, 714 P.2d 604 (Okla. Ct. App. 1985).

together, these developments have for the first time given punitive damages a significant role in the field of contracts.²⁴ Indeed, punitive damages have entered the world of contract with a vengeance: a Texas jury recently awarded \$350 million in punitive damages in an action growing out of a breach of contract. See Foster Nat. Gas Rep. No. 1702 at 1 (Foster Assocs., Dec. 15, 1988).

b. *Product Liability.* Punitive damages also have entered the relatively new field of product liability. Commentators have noted that punitive awards seem anomalous in actions predicated on negligence or strict liability. See, e.g., Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1140-43 (1984); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 24-28 (1982). Perhaps for that reason, as of 1976, punitive verdicts had been approved on appeal in only three product liability cases. See *id.* at 2-3 n.9, citing *Gilham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E. 103 (1970). Since then, however, courts have held punitive damages to be appropriate in the product liability area, and such awards have proliferated.²⁵

²⁴ See generally J. McCarthy, *Punitive Damages in Bad Faith Cases* (3d ed. 1983); Comment, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 Ind. L. Rev. 668 (1975); Comment, *Bad Faith Revisited: An Examination of Tort Law Remedies for Commercial Contract Disputes*, 34 Kan. L. Rev. 315 (1985).

²⁵ See, e.g., *O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Cessna Aircraft Co. v. Fidelity & Casualty Co.*, 616 F. Supp. 671

c. *Mass Torts*. Similarly, punitive damages have increasingly found their way into suits for so-called "mass torts." The first tort actions raising punitive damages issues involving a large group of plaintiffs were brought in 1961 to challenge the sale of an anti-cholesterol drug. See Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37, 51-52 (1983); Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 Calif. L. Rev. 116 (1968). Commenting on the novel issues raised by this litigation, which eventually involved over 1500 suits (see Seltzer, *supra*, at 51-52), Judge Friendly warned: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967). Indeed, hundreds or thousands of punitive claims may grow out of a single design or manufacturing decision, essentially seeking to punish a defendant repeatedly for the same act. See Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986).²⁶ But the courts have never-

(D.N.J. 1985); *Stambaugh v. Int'l Harvester Co.*, 102 Ill. 2d 250, 464 N.E.2d 1011 (1984); *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), 486 U.S. 1032, *cert. denied*, 109 S.Ct. 3265 (1989). See generally Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 268, 271 n.6 (1983); Owen, *supra*, 45 U. Chi. L. Rev. at 3 n.16.

²⁶ This concern is not hypothetical; two major corporations have been forced to seek the protections of bankruptcy because of the sheer number of punitive damage claims. See *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re A.H. Robins Co.*, 85 B.R. 373 (E.D. Va. 1988), *cert. denied*, 110 S.Ct. 376 (1989).

theless failed to develop rules that would cabin the award of punitive damages in this sort of litigation, and accordingly the last 20 years have seen a dramatic growth of punitive claims in mass tort cases. See Seltzer, *supra*, at 39-40.

d. *Standard of Liability*. Commentators also have noted other, less tangible changes in the law of punitive damages, particularly in the sort of conduct that is thought to justify an award. Virtually all courts continue to insist that punitive awards are appropriate only in cases involving malicious, wanton or reckless conduct. But while "[t]he terminology hasn't changed we've played semantic games with the criteria, with the result that malice has been expanded well beyond the areas in which it commonly arises." *Symposium Discussion, supra*, 56 S. Cal. L. Rev. at 159 (remarks of Prof. Ellis). See *id.* at 160 (remarks of Prof. Wheeler); P. Huber, *supra*, at 128; DuBois, *Punitive Damages: Bonanza or Disaster?* 3 Litigation 35 (1976). Cf. *Smith*, 461 U.S. at 77 n.11 (Rehnquist, J., dissenting). The effects of all of these changes are outlined below.

2. *The Growth in Frequency and Size of Awards*. There can be no doubt that the past 20 years have seen an extraordinary change in the nature of punitive damages. Practitioners and commentators repeatedly note the "drastic,"²⁷ "dramatic[],"²⁸ "mind-boggling,"²⁹ "explosive"³⁰ increase in the frequency and severity of

²⁷ Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 Calif. L. Rev. 1433, 1437 (1987).

²⁸ Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982).

²⁹ National Association of Independent Insurers, *Punitive Damages and the Civil Justice System* at 5 (1985).

³⁰ U.S. Tort Policy Working Group, *An Update on the Liability Crisis* (1987).

awards. "[E]normous"³¹ and "astronomical"³² verdicts are observed to be common in settings where, until recently, they would have been "unimaginable"³³ or "inconceivable"³⁴; "[t]hey are now dramatically awarded in cases in which liability of any sort would have been almost out of the question merely fifteen years ago."³⁵ Punitive damages are said in some cases to have gotten "out of hand";³⁶ one influential commentator who wrote approvingly of punitive damage awards a decade ago has now expressed "concern . . . that large awards of this type are becoming common."³⁷ While demands for punitive damages "were extremely rare until the 1960's,"³⁸ they now are described as "routine when the injury is serious and a wealthy institution is numbered among the accused,"³⁹ and are said to "accompany a substantial part, if not the majority of the claims placed in litigation";⁴⁰ indeed, it is now "an anomaly when one sees a complaint which does not seek punitive damages."⁴¹

³¹ DuBois, *supra*, 3 Litigation at 35.

³² Sales & Cole, *supra*, 37 Vand. L. Rev. at 1154.

³³ Schulkin, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L.J. 1797, 1797-1798 n.6 (1979).

³⁴ Note, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishments*, 1984 U. Ill. Rev. 153, 153.

³⁵ Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133 (1982).

³⁶ ABA 1-2.

³⁷ Owen, *supra*, 49 U. Chi. L. Rev. at 6.

³⁸ P. Huber, *supra*, at 127.

³⁹ *Id.*

⁴⁰ Morrison, *Punitive Damages and Why the Reinsurer Cares*, 20 The Forum 23 (1984).

⁴¹ Levit, *supra*, at 259. See Jeffries, *supra*, 72 Va. L. Rev. at 143.

The courts themselves have noted the "present-day practice of seeking punitive damages in substantially all damages actions, and what will reasonably be termed the explosion of punitive damage awards." *Rosener v. Sears Roebuck & Co.*, 110 Cal. App. 3d 740, 762, 168 Cal. Rptr. 237, 250 (1980) (Ellington, J., concurring) (emphasis in original), *app. dismissed*, 450 U.S. 1051 (1981). As one court concluded: "judgments for punitive damages are now routinely entered across the nation, and staggering sums have been awarded." *Moore v. Remington Arms Co.*, 100 Ill. App. 3d 1102, 1104, 427 N.E.2d 608, 616-617 (1981).

This impressive body of anecdotal evidence of growth in the size and frequency of punitive awards is supported by the available empirical data. By far the most comprehensive empirical study was one conducted by the RAND Institute for Civil Justice. Peterson, Sharma & Shanley, *Punitive Damages—Empirical Findings* (RAND R-3311-1CJ 1987) (hereinafter cited as "RAND"). This study reviewed virtually all civil jury trials and verdicts in Cook County, Illinois, and San Francisco County, California, during the period 1960-1984, which it divided into three categories: business tort and contract cases, intentional tort cases, and personal injury cases (including negligence and strict liability actions).⁴² The study also reviewed all civil jury trials and verdicts in California for the period 1980-1984. In both of the metropolitan jurisdictions studied over time, the number and amount of awards (measured in constant dollars⁴³) "increased substantially." RAND iii. Because the RAND data are the best available on the issue of how punitive damage awards have changed in modern times, they warrant an extended discussion.

⁴² See RAND 4 & n.3. The study considered only 25% of automobile and common carrier cases in Cook County.

⁴³ All of the dollar figures used in the RAND study are expressed in constant 1984 dollars.

a. *Frequency of Punitive Damage Awards.* The figures produced by the RAND report describing the increased frequency of punitive damage awards are striking. During the entire decade of the 1960s, punitive damages were awarded in only four business cases in Cook County for a total of \$0.31 million, and in only eight such cases in San Francisco for a total of \$0.4 million. For the five years from 1980 through 1984, in contrast, punitive damages were awarded in 23 business cases in Cook County for a total of \$14 million, and in 34 cases in San Francisco for a total of \$17 million. RAND 23-24. During the 1960-1964 period, punitive damages were awarded in two intentional tort cases in Cook County for a total of \$0.01 million; in 1980-1984 they were awarded in 38 Cook County intentional tort cases for a total of \$13 million. RAND 24-25.⁴⁴ In the personal injury area, there were no punitive damage awards in Cook County between 1960 and 1964, while all of the punitive awards from 1965-1980 totalled only \$1.4 million; from 1980 to 1984 there were 14 punitive awards in such cases for a total of \$27 million. RAND 21 table 2.9. Although the totals were smaller, the number of punitive damage awards in personal injury cases also increased in San Francisco; there were six such awards during 1980-1984, compared to one in each of the four preceding five-year periods. *Id.*

The RAND study makes clear that these increases are not a function of a simple growth in the number of suits being filed: the *rate* of awards is itself increasing dramatically. In Cook County from 1960-1964, punitive damages were awarded in only 0.2% of all cases in which compensatory relief was awarded; in 1980-1984, punitive

⁴⁴ The rate of punitive awards in intentional tort cases in San Francisco did not change, since "[p]rior to 1980 jurors in San Francisco imposed punitive damages in intentional tort cases far more frequently than did Cook County juries. The increased rate of punitive damages in Cook County during the 1980s merely brought that jurisdiction to the higher rate of San Francisco." RAND 11; see *id.* at 25.

damages were awarded in 3.9% of all suits in which there were compensatory awards—an increase of almost 2000%. The figures in San Francisco are equally dramatic. There, during 1960-1964, punitive damages were awarded in 2% of the actions in which there were compensatory awards; in 1980-1984, San Francisco plaintiffs received punitive damages in 13.6% of the actions in which plaintiffs prevailed—an increase of almost 700%. And the speed of increase is accelerating. The rate of punitive awards almost doubled in Cook County from the late 1970s to the early 1980s, and more than doubled in San Francisco. RAND 9 & table 2.1.

These figures demonstrate that awards of punitive damages, while certainly not the norm, are no longer reserved for exceptional cases. And looking at particular categories of suits yields even more striking results. In intentional tort cases that produced compensatory relief during 1980-1984, punitive damages were awarded 36% of the time in California and 33% of the time in Cook County. RAND 35 table 3.2. Almost 35% of the California defendants that were found liable for business torts or breach of contract were assessed punitive damages. RAND 35 table 3.2, 46 table 4.3. While punitive damages were awarded at much lower rates in personal injury cases—both in San Francisco and in Cook County during 1980-1984, they were assessed in one to three per cent of the cases in which jurors found liability (RAND 11 table 2.4)⁴⁵—even in personal injury cases punitive liability frequency was increasing. RAND 12.⁴⁶

⁴⁵ These findings are consistent with a study of reported decisions by Judge Posner and Professor Landes, which found that plaintiffs obtained punitive awards in a very small percentage of products liability cases. See Landes & Posner, *New Light on Punitive Damages*, Regulation, Sept.-Oct. 1986 at 33, 34-35, 36.

⁴⁶ Professor Priest, who also has reviewed civil verdicts in Cook County, reports that "[p]unitive damage awards have increased dramatically in recent years." He found that such damages "have been awarded in Cook County now in virtually all areas of civil

Other studies, while not conclusive, also point to a significant increase in the frequency of punitive damage awards. A search of Lexis computer files disclosed that the terms "punitive" and "exemplary" damages appeared in 0.007% of all civil cases in 1960 and 0.011% in 1970; the percentage reached 0.19% in 1980. Owen, 49 U. Chi. L. Rev. at 2 n.6. Similarly, as noted above, through 1976 there were only three reported decisions upholding punitive damage awards in product liability cases, all involving verdicts under \$250,000; in contrast, in 1982 alone nine such awards were upheld, all exceeding \$1 million. P. Huber, *supra*, at 127. See *Symposium Discussion, supra*, 56 S. Cal. L. Rev. at 160 (remarks of Prof. Wheeler).

Other data confirm the dramatic increase in punitive damage claims. Thus, prior to 1970, only one or two of the hundreds of product liability lawsuits filed against the Ford Motor Company each year sought punitive damages—a rate of less than 0.5%. By 1975, 5.4% of the suits against Ford sought punitive damages; by 1980, the percentage reached 27.1%. Owens, *supra*, 49 U. Chi. L. Rev. at 54 n.258. See P. Huber, *supra*, at 127.

b. *Size of Punitive Damage Awards.* Even more notable than the increase in the frequency of punitive damage awards has been what one survey termed "the extraordinary growth in the size of such awards."⁴⁷ Again, the RAND study provides the fullest available picture of this development. Measured in 1984 dollars, the median punitive damage award in Cook County in 1960-1964 was \$1000 and the average \$7000; in 1980-1984, the median

liability, from street hazard and road construction cases to product liability, malpractice, and landlord-tenant cases. Since the late 1960s, there has occurred a steady increase in the number of punitive damage judgments in business tort and—unusually enough—contract breach cases." Priest, *supra*, at 123.

⁴⁷ United States Tort Policy Working Group, *An Update on the Liability Crisis* 49 (1987).

had climbed to \$43,000 and the average to \$729,000—an increase of 4300% and 10,000%, respectively. The movement in San Francisco was similar: in 1960-1964 the median punitive damage award was \$17,000 and the average \$166,000; in 1980-1984 the median was \$63,000 and the average \$381,000. RAND 14-15. Indeed, in 1980-1984 the median punitive damage award for California as a whole was \$78,000 and the average \$743,000; the median for Los Angeles County was \$100,000, and the average of the County's 149 punitive damage awards was \$1.3 million. RAND 37 table 3.4.

Looking at particular categories of claims and types of defendants reveals plainly the magnitude of these awards. The median punitive damage award in California bad faith contract actions during 1980-1984 was \$336,000 and the average \$1.6 million. RAND vi-vii. Of the 38 punitive damage awards against businesses in Cook County from 1980 through 1984, the median award was \$143,000 and the average \$1.339 million; the median of the 321 punitive damage awards against businesses in California during that period was \$100,000 and the average just under \$1 million. RAND 51 table 4.7.

In reviewing these figures, it is the magnitude of the average award that is remarkable. Most punitive damage awards, of course, remain relatively modest, a fact that is reflected in the size of the median awards. See RAND 17. That being so, however, the average award may approach or exceed \$1 million only if the largest awards are phenomenal in size. And that, in fact, appears to be the case.⁴⁸ The RAND study of Cook County, for exam-

⁴⁸ Of course, the amount awarded by the jury is not necessarily the amount received by the plaintiff; verdicts may be reduced in post-trial proceedings or through settlement. The RAND study, however, found that plaintiffs ultimately receive a large portion—something over 50%—of the punitive damages awarded by juries. RAND 26-30. See Shanley & Peterson, *Posttrial Adjustments to Jury Awards* (RAND R-3511-ICJ 1987) 32. Not surprisingly, the largest awards stand the greatest chance of being reduced by settlement or court action. RAND 26-30.

ple, found several extraordinarily large punitive personal injury awards during 1980-1984, which "were something new in personal injury trials In fact, each of the three largest awards was more than twice the \$1.4 million total of the previous 20 years." RAND 22.

C. Punitive Damage Awards Are Subject To Review Under The Fourteenth Amendment And The Award In This Case Was Arbitrary And Excessive.

Viewed from the perspective of history, it is not surprising that a serious challenge under the Due Process Clause of the Fourteenth Amendment to a punitive damage award has only now made its way to the docket of this Court: it is only in recent years that punitive damage awards subject to challenge as unconstitutionally excessive and arbitrary have been imposed upon defendants. From 1789 until 1970, the limited availability and small magnitude of punitive damage awards gave no serious basis for anyone to claim protection under the Due Process Clause. In recent years, however, the need for constitutional scrutiny of punitive damage awards has become increasingly clear.

The development that has exposed punitive damage awards to scrutiny under the Due Process Clause is illustrated by the facts of this case, which involves a punitive award that is many times larger than the actual damages incurred⁴⁹ and is the product of the totally unfettered discretion of the jury. The trial court below imposed no limitation whatsoever on the severity of the punishment the jury could inflict and, as a result, the

⁴⁹ Although there was no differentiation between the punitive and compensatory elements of the damages awarded below, it is worth noting that the crux of the plaintiffs' complaint was the defendant's failure to pay a \$2500 hospital bill incurred by plaintiff Haslip who, individually, was awarded a total of \$1,040,000.

award bore no relationship to the harm inflicted on the plaintiffs, or to the gain received by the defendants.⁵⁰

In *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989), Justice Brennan, joined by Justice Marshall, recently expressed the concern over the trend in which "punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Id.* at 2923 (Brennan, J., concurring). Such "unbridled discretion to impose punitive damages" simply cannot withstand due process scrutiny. See *id.* at 2924 (O'Connor, J., concurring).⁵¹ Due process requires, at a minimum, procedural and substantive standards to guide juries in awarding punitive damages.⁵² Vague and general instructions about the need to punish or deter do not provide the requisite degree of protection. To the contrary, they afford juries what amounts to "wholly standardless discretion to determine the severity of punishment." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring). The consequence of this approach has been to subject defendants in civil litigation to explosively large and frequent punitive damage awards. Because these awards have become completely subjective, arbitrary and excessive, they violate both the procedural and substantive components

⁵⁰ The trial court instructed the jury that if they found fraud they could "at [their] discretion award what is known as punitive damages." Petition for Certiorari at 8. If, in their "discretion," they decided to do so, the court instructed the jury simply to "take into consideration" the "character and degree of the wrong" and the "necessity of preventing similar wrongs." *Id.* at 9.

⁵¹ Petitioner addresses the application of the Due Process Clause to punitive jury awards; repetition of those arguments here is therefore unnecessary.

⁵² Legislatures could establish standards that define the specific circumstances under which punitive damages may be appropriate and impose limits or guidelines as to award amounts. In addition, a higher standard of proof, such as clear and convincing evidence, could be required to impose punitive damages.

of the Due Process Clause. Because the punitive award in this case violates these fundamental constitutional precepts of fairness, it should be set aside.

In saying this, we do not mean to suggest that many punitive damages awards—or, for that matter, that all of the largest awards—are constitutionally defective. But history teaches that acceptable punitive awards are those that bear some relationship to the offensiveness of the defendant's conduct. Those were the sorts of punitive damage verdicts that were familiar to the Framers of the Constitution, and that survived without constitutional challenge for the better part of two centuries. Awards such as the one here, which bear no relation to the defendant's wrong, should be subject to scrutiny under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

BENJAMIN W. HEINEMAN, JR.
PHILIP A. LACOVARA
GENERAL ELECTRIC COMPANY
3135 Easton Turnpike
Fairfield, CT 06431
(203) 373-2492

MARTIN F. CONNOR
AMERICAN TORT REFORM
ASSOCIATION
1212 New York Avenue, N.W.
Washington, D.C. 20005
(202) 682-1163

THOMAS SCHMIDT
MINNESOTA CIVIL JUSTICE
COALITION
4700 IDS Center
Minneapolis, MN 55402
(612) 330-3000

REX E. LEE
CARTER G. PHILLIPS *
LOREEN M. MARCIL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for the Amici Curiae

June 1, 1990

* Counsel of Record

APPENDIX

APPENDIX A

Set out below (by state) is a comprehensive (although necessarily non-exhaustive) list of nineteenth century decisions that report the size of punitive (as well as combined punitive and compensatory) damage awards. We used data provided by the Bureau of Labor Statistics' Consumer Price Index to convert the nineteenth century figures into 1987 dollars; in reporting the nineteenth century verdicts listed below, we give the real awards in parentheses, followed by their December 1987 values in brackets.

Punitive Component Specified:

Kansas:

Southern Kan. Ry. v. Rice, 38 Kan. 398 (1888) (\$71.75—punitive; \$35—costs & fees; \$10—injury to feelings) [\$918.67—punitive; \$448.13—costs & fees; \$128.04—injury to feelings].

Minnesota:

McCarthy v. Niskern, 22 Minn. 90 (1875) (\$900) [\$9,428.18].

Mississippi:

New Orleans, J. & Great N.R.R. v. Hurst, 36 Miss. 660 (1859) (\$4,500) [\$57,616.67].

New Orleans, J. & Great N.R.R. v. Statham, 42 Miss. 607 (1869) (\$3,275) [\$28,304.19].

New Hampshire:

Taylor v. Grand Truck Ry. of Can., 48 N.H. 304 (1869) (\$500—actual; \$858.50—exemplary) [\$4321.25—actual; \$7,419.59—exemplary].

Woodman v. Nottingham, 49 N.H. 387 (1870) (\$578—actual; \$100—exemplary) [\$5258.28—actual; \$909.74—exemplary].

Fay v. Parker, 53 N.H. 342 (1872) (\$150—actual; \$331.67—exemplary) [\$1,440.42—actual; \$3,184.95—exemplary].

New Jersey:

Coryell v. Colbaugh, 1 N.J.L. 77 (1791) 75 pounds 35 s, 9 d.

North Carolina:

Pendleton v. Davis, 46 N.C. (1 Jones) 98 (1853) (\$100—actual; \$1000—exemplary) [\$1,382.80—actual; \$13,828.00—exemplary].

Pennsylvania:

Pittsburgh, C. & St. L. Ry v. Lyon, 123 Pa. 140 (1888) (\$200) [\$2,560.74].

Texas:

Neill v. Newton, 24 Tex. 202 (1859) (\$100) [\$1,280.37].

Dillon v. Rogers, 36 Tex. 152 (1871-72) (\$100) [\$960.28].

Bradshaw v. Buchanan, 50 Tex. 492 (1878) (\$75) [\$894.05].

Wisconsin:

Benaway v. Conyne, 3 Pin. 196 (Wis. 1851) (\$400) [\$5,531.20].

Hamlin v. Spaulding, 27 Wis. 360 (1870) (\$100) [\$909.75].

Compensatory & Punitive (where the components are not separated):

United States:

Lake Shore & Mich. S. Ry. v. Prentice, 147 U.S. 101 (1893) (\$6,000) [\$76,822.22].

Arkansas:

Clark v. Bales, 15 Ark. 452 (1855) (\$100) [\$1,234.64].

Barlow v. Lowder, 35 Ark. 492 (1880) (\$180) [\$2,145.72].

Kelly v. McDonald, 39 Ark. 387 (1882) (\$117.53) [\$1,401.04].

Ward v. Blackwood, 41 Ark. 295 (1883) (\$2,000) [\$24,692.86].

California:

Dorsey v. Manlove, 14 Cal. 553 (1860) (\$2,000) [\$25,607.41].

Nightingale v. Scannell, 18 Cal. 315 (1861) (\$5,000) [\$64,018.52].

Lyon v. Hancock, 35 Cal. 372 (1868) (\$1,100) [\$9,506.75].

Connecticut:

Edwards v. Beach, 3 Day 447 (Conn. 1809) (\$50) [\$367.77].

Dennison v. Hyde, 6 Conn. 508 (1827) (\$1,200) [\$12,201.18].

Linsley v. Bushnell, 15 Conn. 225 (1842) (\$900) [\$10,728.62].

Dibble v. Morris, 26 Conn. 416 (1857-58) (\$225) [\$2,777.95].

Welch v. Durand, 36 Conn. 182 (1869) (\$200) [\$1,728.50].

Dalton v. Beers, 38 Conn. 529 (1871) (\$60) [\$576.17].

District of Columbia:

Huber v. Teuber, 10 D.C. (3 MacArth.) 484 (1877-79) (\$2,500) [\$27,007.81].

Florida:

Florida Ry. & Navigation Co. v. Webster, 25 Fla. 394 (1889) (\$9,000) [\$115,233.33].

Georgia:

Green v. Southern Express Co., 41 Ga. 516 (1871) (10,000) [\$96,007.78].

Illinois:

Schlenker v. Risley, 4 Ill. 483 (1842) (\$333) [\$3,969.59].

Chicago W. Div. Ry. v. Hughes, 87 Ill. 94 (1877) (\$4,500) [\$48,614.06].

McIntyre v. Sholty, 121 Ill. 660 (1887) \$2,500 [\$32,009.26].

Indiana:

Taber v. Hutson, 5 Ind. 322 (1854) (\$600) [\$7,682.22].

Nossaman v. Rickert, 18 Ind. 350 (1862) (\$250) [\$2,880.83].

Humphries v. Johnson, 20 Ind. 190 (1863) (\$200) [\$1,868.65].

Iowa:

Frink & Co. v. Coe, 4 Greene 555 (Iowa 1954) (\$270) [\$3,457.00].

Brown v. Allen, 35 Iowa 306 (1872) (\$3,600) [\$34,570.00].

Milwaukee & St. P. R.R. v. Arms, 91 U.S. 489 (1875) (from Iowa Circuits) (\$4,000) [\$41,903.03].

Cameron v. Bryan, 89 Iowa 214 (1893) (\$1,500) [\$19,205.56].

Kansas:

Sawyer v. Sauer, 10 Kan. 351 (1872) (\$3,500) [\$33,609.72].

Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350 (1887) (\$1,000) [\$12,803.70].

Kentucky:

Worford v. Isbel, 4 Ky. 247 (1808) (\$397.50) [\$2,862.83].

Maysville & L.R.R. v. Herrick, 76 Ky. 122 (1877) (\$5,200) [\$56,176.25].

Louisville & N.R.R. v. Ballard, 85 Ky. 307, 3 S.W. 530 (1887) (\$3,000) [\$38,411.11].

Maine:

Pike v. Dilling, 48 Me. 539 (1861) (\$151.25) [\$1,936.56].

Goddard v. Grand Truck Ry. of Can., 57 Me. 202 (1869) (\$4,850) [\$41,916.13].

Wilkinson v. Drew, 75 Me. 360 (1883) (\$170.83) [\$2,109.14].

Maryland:

Mulatto Joan v. Joshua Shield's Lessee, III Early Maryland Reports 7 (1790) (125 pounds).

Gaither v. Blowers, 11 Md. 536 (1857) (\$1,750) [\$21,606.25].

Schindel v. Schindel, 12 Md. 108 (1858) (\$629.50) [\$8,369.93].

Massachusetts:

Bodwell v. Asgood, 20 Mass. (3 Pick.) 379 (1825) (\$1,400) [\$14,234.71].

Austin v. Wilson, 4 Cush. 273 (Mass. 1849) (\$30) [\$414.84].

Ellis v. Brockton Publishing Co., 198 Mass. 538 (1908) (\$154) [\$1,971.77].

Michigan:

Lucas v. Michigan Cent. R.R., 98 Mich. 1 (1893)
(\$1,200) [\$15,364.44].

Minnesota:

Lynd v. Picket, 7 Minn. 184 (1862) (\$439.59)
[\$5,065.54].

Mississippi:

New Orleans, J. & Great N.R.R. v. Allbritton, 38 Miss.
242 (1859) (\$10,000) [\$128,037.04].

Whitfield v. Whitfield, 40 Miss. 352 (1866) (\$6,925)
[\$54,408.47].

Memphis & C. R.R. v. Whitfield, 44 Miss. 466 (1870)
\$4,500) [\$40,938.16].

Missouri:

Goetz v. Ambs, 27 Mo. 28 (1858) (\$3,000) [\$39,888.46].

Kennedy v. North Mo. R.R., 36 Mo. 351 (1865) (\$2,000)
[\$15,030.43].

Buckley v. Knapp, 48 Mo. 152 (1871) (\$5,000)
[\$48,013.89].

New Jersey

Vunck v. Hull, 3 N.J.L. 814 (1809) (\$400) [\$2,942.13].

Berry v. Vreeland, 21 N.J.L. 183 (1 Zabriskie) (1874)
\$300) [\$3,703.93].

New York:

Cook v. Hill, 5 N.Y. Sup. Ct. 341 (1849) (\$600)
[\$8,296.80].

Ohio:

Roberts v. Mason, 10 Ohio St. 277 (1859) (\$700)
[\$8,962.59].

Pennsylvania:

Roberts v. Swift, 1 Yeates 209 (Pa. 1793) (720 pounds).

Dennis v. Barber, 6 Serg. & Rawle 420 (Pa. 1821)
(\$500) [\$4,321.25].

Porter v. Seiler, 23 Penn. 424 (1854) (\$2,000)
[\$25,607.41].

Texas:

Brooke v. Clark, 57 Tex. 105 (1882) (\$5,500)
[\$65,563.79].

Vermont:

Hoadley v. Watson, 45 Vt. 289 (1873) (\$200)
[\$1,920.56].

Virginia:

Parsons v. Harper, 16 Gratt 64 (Va. 1860) (\$1,000)
[\$12,803.70].

Borland v. Barrett, 76 Va. 128 (1882) (\$1,000)
[\$11,920.69].

Wisconsin:

Barnes v. Martin, 15 Wis. 240 (1862) (\$2,000)
[\$23,046.67].

Pickett v. Crook, 20 Wis. 358 (1866) (\$100) [\$785.68].

Cracker v. Chicago & N.W. Ry., 36 Wis. 657 (1875)
(\$1,000) [\$10,475.76].

Meibus v. Dodge, 38 Wis. 300 (1875) (\$250) [\$2,618.94].

Bass v. Chicago & N.W. Ry., 39 Wis. 636 (1876)
(\$4,500) [\$48,614.06].

26

NO. 89-1279

Supreme Court, U.S.
FILED

JUN 1 1990

JOSEPH F. SPANIEL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

Pacific Mutual Life Insurance Company,

Petitioner,

v.

Cleopatra Haslip, Cynthia Craig, Alma M. Calhoun
and Eddie Halgrove,

Respondents.

On Writ of Certiorari To The Supreme Court of Alabama

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Robert L. Barr, Jr.*
G. Stephen Parker
Robert B. Baker, Jr.

Southeastern Legal Foundation, Inc.
2900 Chamblee-Tucker Road
Building 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Amicus Curiae
Southeastern Legal Foundation, Inc.

June, 1990

*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS	1
STATEMENT OF CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. EXCESSIVE PUNITIVE DAMAGES OVERCOMPENSATE PLAINTIFFS AND DETER BUSINESSES ENGAGED IN USEFUL ACTIVITIES; THIS DETERRENCE STIFLES RESEARCH AND DEVELOPMENT AND INNOVATIVE THINKING, AND NEEDLESSLY RESTRICTS THE AVAILABILITY OF IMPORTANT PRODUCTS TO U.S. CONSUMERS AND BUSINESSES, AND UNNECES- SARILY REDUCES U.S. COMPETI- TIVENESS ABROAD.	3
A. MANY BUSINESSES DO NOT TRUST THE JUDICIAL SYSTEM TO FAIRLY ADJUDICATE PUNI- TIVE DAMAGE CLAIMS.	5
B. EXCESSIVE PUNITIVE DAM- AGES LIMIT PRODUCT AVAIL- ABILITY AND DEVELOPMENT.	7

	PAGE
C. EXORBITANT PUNITIVE DAMAGES STIFLE BASIC RESEARCH AND INNOVATIVE THOUGHT.	9
D. EXCESSIVE PUNITIVE DAMAGES WEAKEN U.S. COMPETITIVENESS ABROAD.	11
E. EXCESSIVE PUNITIVE DAMAGES ADVERSELY EFFECT AGENCY RELATIONSHIPS WHICH ARE IMPORTANT TO THE PRESENT AND FUTURE SUCCESS OF AMERICAN BUSINESSES.	12
II. PUNITIVE DAMAGE AWARDS OF MORE THAN DOUBLE THE COMPENSATORY AWARD ARE JUSTIFIED IN ONLY FOUR CIRCUMSTANCES.	14
III. CONCLUSION.	17

TABLE OF AUTHORITIES	
CASES:	PAGE
<i>Boise Dodge v. Clark</i> , 92 Idaho 902 (1969)	14
<i>Gremshaw v. Ford Motor Co.</i> , 119 Cal. App. 3d 757 (1981)	15
<i>Roginsky v. Richardson-Merrell</i> , 378 F.2d 832 (2nd Cir. 1967)	14, 16
MISCELLANEOUS:	
American College of Trial Lawyers, <i>Report on Punitive Damages</i> 15 (1989)	15
American Medical Association, "Impact of Product Liability on the Development of New Medical Technologies," <i>Proceedings House of Delegates</i> (137th Annual Meeting June 18-22, 1988)	7-8, 9
<i>Business Struggling to Adapt as Insurance Crisis Spreads</i> , Wall Street Journal, January 21, 1986	9
B. Chapman and M. Trebilcock, <i>Punitive Damages Divergence in Search of a Rationale</i> , 40 Ala. L. Rev. 741 (1989)	11
A. Chin & M.A. Peterson, <i>Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trails</i> (The RAND Corp. 1985)	6

	PAGE
<i>Claim File Data Analysis: Technical Analysis of Study Results 86-87</i> (Insurance Services Office 1988)	6
D. Dobbs, <i>Ending Punishment in "Punitive" Damages: Deterrence Measured Remedies</i> , 40 Ala. L. Rev. 83 (1989)	4
D. Ellis, <i>Fairness and Efficiency in the Law of Punitive Damages</i> , 56 S. Cal. L. Rev. 1 (1982)	4
D. J. Teece, <i>The Competitive Challenge: Strategies for Industrial Innovation and Renewal</i> 3 (1987)	11
<i>Does the Fear of Litigation Dampen the Drive to Innovate?</i> The New York Times, May 12, 1987	9, 10
E. B. Connell, <i>Technology Review</i> , Vol. 90, No. 19 (May-June 1987)	8
E. D. Elliott, <i>Why Punitive Damages Don't Deter Corporate Misconduct Effectively</i> , 40 Ala. L. Rev. 1053 (1989)	16
E. McGure, <i>The Impact of Product Liability</i> , Report No. 908 (The Conference Board 1988)	5
M. Brody, <i>When Products Turn Into Liabilities</i> , Fortune, March 3, 1986	10

Owen, <i>Problems in Assessing Punitive Damages Against Manufacturers of Defective Products</i> , 49 U. Chi. L. Rev. 1 (1982)	16
P. Huber, <i>Liability: The Legal Revolution and Its Consequences</i> (1988)	6, 8, 9, 10, 12
P. Rueter, <i>The Economic Consequences of Expanded Corporate Liability: An Explanatory Study</i> (The RAND Corp. 1988)	8, 10
<i>Product Liability (Part I): Hearings before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce</i> , 100th Congress, 1st Session 550 (1987)	11
R. Epstein, <i>Modern Products Liability Law</i> (1980)	7
R. Mahoney & S. Littlejohn, <i>Innovation on Trial: Punitive Damages Versus New Products</i> , 256 Science 1395 (1989)	passim
R. Willard & R. Willmore, <i>An Update on the Liability Crisis</i> (U.S. Dept. of Justice 1987) 47	6
W. Anderson, <i>Remarks Made at the Annual Meeting of the National Association of Casualty & Surety Executives</i> , White Sulphur Spring, W. Va. (October 7, 1986)	8
Restatement (Second) of Torts, Sec. 908 (1) (1977)	4

NO. 89-1279

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

Pacific Mutual Life Insurance Company,

Petitioner,

v.

Cleopatra Haslip, Cynthia Craig, Alma M. Calhoun
and Eddie Halgrove,

Respondents.

On Writ of Certiorari To The Supreme Court
of Alabama

INTEREST OF AMICUS

The Southeastern Legal Foundation, Inc. ("Southeastern") submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief. Petitioner's consent letter has been filed with the Clerk of this Court. Respondents have issued a blanket consent for all parties wishing to file *amicus* briefs.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving signifi-

cant issues. Dedicated to economic and social progress through the equitable administration of law, Southeastern presents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Towards that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *South Florida Chapter of the AGC of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir. 1984), *cert. denied* 469 U.S. 871 (1984); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); and *City of Richmond v. J.A. Croson Co.*, _____ U.S. _____, 109 S.Ct.706 (1989). Additionally, Southeastern has recently submitted *amicus curiae* briefs in *Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, Case No. 89-700, and *U.S. v. Eichman* and *U.S. v. Haggerty*, Case Nos. 89-1433, 89-1434, which are pending before this Court.

STATEMENT OF THE CASE

Southeastern adopts the statement of the case contained in the brief on behalf of Petitioner Pacific Mutual Life Insurance Company.

SUMMARY OF ARGUMENT

From an economic point of view, excessive punitive damages deter businesses from engaging in activities

beneficial to society. Excessive punitive damages stifle research and development of new products, and suppress innovative thinking and the application of novel ideas in service oriented businesses.

American business has learned to manage and quantify the economic risks of research, but cannot assess the risks of future legal costs due in large part to the uncertainty of punitive damages. The result is that many important products and innovative applications of new ideas are withdrawn from the public, sold in restricted markets, or never developed at all. Worse yet, such an environment stifles initial research in legally "high risk" areas from its inception. It is therefore not surprising that the United States is losing its perennial advantage of fostering innovative thinking and basic research, an advantage due in large part to this country's past commitment to free enterprise ideals and a legal environment that did not deter creative thought.

While *Amicus* contends that an agency relationship was not established, under the facts of this case, the decision of the Alabama Supreme Court could have an adverse impact on agency relationships in the business setting. Agency relationships will be jeopardized if juries require principals to be liable for punitive damages for the actions of their agents, even after the principals have performed satisfactory background checks and maintain adequate business supervision.

ARGUMENT

I. EXCESSIVE PUNITIVE DAMAGES OVERCOMPENSATE PLAINTIFFS AND DETER BUSINESSES ENGAGED IN USEFUL ACTIVITIES; THIS DETERRENCE

STIFLES RESEARCH AND DEVELOPMENT AND INNOVATIVE THINKING, AND NEEDLESSLY RESTRICTS THE AVAILABILITY OF IMPORTANT PRODUCTS TO U.S. CONSUMERS AND BUSINESSES, AND UNNECESSARILY REDUCES U.S. COMPETITIVENESS ABROAD.

Punitive damages are assessed in addition to compensatory damages to punish the defendant for the commission of an aggravated or outrageous act of misconduct and to deter him and others from such conduct in the future. *Restatement (Second) of Torts*, Section 908(1) (1977). However, from an economic point of view, excessive punitive damage awards inhibit conscientious businesses from engaging in activities beneficial to society. D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 47 (1982); F. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 859 (1989).

If the potential liability of engaging in an activity outweighs the potential gain of the endeavor, a business will not pursue the activity even though the result would be an asset to a certain segment of our society, or to society in general. Similarly, even if the business incorrectly perceives the potential liability to be more than it actually is, the business will not pursue the activity. These attitudes are becoming prevalent among businessmen according to several commentators. R. Mahoney & S. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 256 Science 1395 (1989).

A. MANY BUSINESSES DO NOT TRUST THE JUDICIAL SYSTEM TO FAIRLY ADJUDICATE PUNITIVE DAMAGE CLAIMS.

Today many businesses do not trust the judicial system to adjudicate punitive damage claims fairly and impartially. By analogy, in the late 1960's and 1970's, although innocent of negligent product design, manufacturers were still found liable under strict liability theories. Manufacturers who painstakingly considered every safety feature imaginable, enough to win any claim of negligent design, were shocked to learn that they might be liable under an unanticipated "new" legal device that made all their efforts for a safe design irrelevant. Just as the use of strict liability became commonplace in the 1970's, businesses today are afraid that excessive punitive damages will become commonplace in the 1990's. See R. Mahoney, at 1395.

Businesses assess risks. Businesses can even make the difficult assessment of whether the risk of scientific research today will later pay out in profits many years from now. But businesses today say that they are incapable of proper risk assessment due to the uncertainty created in the courts. R. Mahoney, at 1395. Adding to this fear is the fact that risk assessments made for products introduced in the 1960's were shattered with the use of strict liability in the 1970's. Businesses are afraid that history may be repeating itself in the form of punitive damages. R. Mahoney, at 1395-1397; see also E. McGuire, *The Impact of Product Liability*, Report No. 908 (The Conference Board 1988) at 8, 20 (Discussing the results of a 1988 Conference Board survey of chief executive officers from the nation's leading companies).

Although large punitive damage claims are rarely awarded, businesses are forced to bear the increased cost of

more claims and higher settlements. Even one large punitive damage award tends to bring out a multitude of claims from plaintiffs hoping to be the "lucky one". R. Willard and R. Willmore, *An Update on the Liability Crisis* (U. S. Dept. of Justice 1987) 47-51. This increases the number of suits filed, thus raising the cost of legal fees for potential defendants. Further, studies have shown that settlements where punitive damages claims are involved are much higher than without them. One study showed that settlements of claims where plaintiffs sought punitive damages were nearly 150% higher than similar settled disputes without punitive damages claims; another study showed that the prospect of punitive damages being awarded increased settlements by 60%. See, *Claim File Data Analysis: Technical Analysis of Study Results* 86-87 (Insurance Services Office 1988) at 86-87.

Research has also shown that corporate defendants are more likely to be the target of punitive damages claims than individuals, and that juries also award more to plaintiffs when the defendant is an institution or organization as opposed to an individual. A. Chin and M. A. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* (The RAND Corp. 1985) at 27.

Businesses have developed an overcautious attitude. Recent court decisions have fostered an environment where businesses cannot feel comfortable in their risk assessments when introducing new products or innovative business ideas. "Consulting engineers report that they systematically favor old products over new ones in their design specifications, fearing (quite correctly) that newer design options carry a greater risk of liability, whatever real decrease in risk they may actually represent." F. Huber, *Liability: The Legal Revolution and Its Consequences* 156 (1988).

Both businessmen and commentators realize that the standards for assessing punitive damages are tenuous at

best. Richard J. Mahoney, Chairman and CEO of Monsanto Company stated that: "[t]he punitive damages system makes it too easy for lawyers to mislead jurors, many of whom possess little scientific background but believe in the possibility of a risk-free society, to enrich plaintiffs and their attorneys with multimillion-dollar windfalls." R. Mahoney, at 1396. Mr. Mahoney's fears were expressed by noted legal commentator Richard Epstein over ten years ago. "[I]t is [easy] to slide over the gulf that lies between the willful and flagrant conduct suitable for a punitive damages award to the type of mistaken decision that supports at most a negligence cause of action." R. Epstein, *Modern Products Liability Law*, 1987 (1986). Without firm guidance governing the application of punitive damages, it is understandable that businesses have developed an overcautious attitude concerning their liability.

B. EXCESSIVE PUNITIVE DAMAGES LIMIT PRODUCT AVAILABILITY AND DEVELOPMENT

As a result of the overcautious attitude produced by the uncertain legal environment, many developed products are never introduced into the market place. For example, Monsanto has developed a safe, biodegradable substitute for asbestos, but potential expansion of liability laws has caused Monsanto to cancel the product just before commercialization. R. Mahoney, at 1397. The American Medical Association has determined that because of the legal environment, the development and use of potentially life-saving medical technologies is adversely affected. *See* American Medical Association,

"Impact of Product Liability on the Development of New Medical Technologies," *Proceedings House of Delegates* (137th Annual Meeting June 18-22, 1988) 88.

The same report notes that biomedical research is deteriorating and some companies involved in innovative research are delaying or foregoing product releases. *Id.* For example, Union Carbide has decided to cancel development of its suitcase-sized kidney dialysis unit as well as offering intravenous equipment. *See* W. Anderson, Remarks made at the Annual Meeting of the National Association of Casualty & Surety Executives, White Sulphur Spring, W. Va. (October 7, 1986).

Development of new vaccines for children may never occur as it has been estimated that 95% of the cost of developed childhood vaccines are to cover liability insurance. P. Huber, at 3, 155-161.

Only two U.S. companies are now conducting contraceptive research, an area where the U.S. was a dominant leader. E. B. Connell, *Technology Review*, Vol. 90, No. 19 (May-June 1987). Likewise, foreign manufacturers are hesitant to introduce their products in the U.S. because of the legal environment and potential for high punitive damages awards: these products include FDA approved medical products as well as products American businesses need to compete abroad. R. Mahoney, at 1397.

Some products may be introduced but only in limited areas to avoid potential liability in legally "high risk" applications. For instance, a chemical manufacturer refused to allow its product to be used in aircraft landing gear even though it is believed that the use of the product in landing gear would make them safer. P. Reuter, *The Economic Consequences of Expanded Corporate Liability: An Explanatory Study* (The RAND Corp. 1988) 25-27.

Researchers and those who make useful discoveries are finding it hard to find buyers to implement their ideas. For instance, the Lawrence Livermore Laboratory in California is finding it difficult to generate interest in its food irradiation invention for killing insects, larvae and parasites in fresh fruit and vegetables. *Does the Fear of Litigation Dampen the Drive to Innovate?* The New York Times, May 12, 1987, at 1.

In addition to paying higher prices for goods and services due to businesses passing on their own costs for legal expenses, consumers will pay even higher prices due to the lack of competition. In the 1960's there were eight U.S. manufacturers of whooping cough vaccine, by 1986 there were only two. P. Huber, at 156. Only two major American pharmaceutical companies, Merck and Lederle Laboratories, are investing heavily in vaccine research. *Business Struggling to Adapt to Insurance Crisis Spreads*, Wall Street Journal, January 21, 1986, at 20. It is inevitable that the availability of medical services will be reduced due to the unpredictability caused by punitive damages and society as a whole will be harmed.

C. EXORBITANT PUNITIVE DAMAGES STIFLE BASIC RESEARCH AND INNOVATIVE THOUGHT

Perhaps the most alarming "non-statistic" is the deterrent effect that uncontrolled punitive damages have on basic research. According to the National Academy of Sciences, "given the extremely high cost of vaccine-related injuries, many manufacturers may be unwilling to initiate or pursue the derivation or distribution of a vaccine to prevent AIDS." See American Medical

Association, at 86. One article quoted pharmaceutical industry representatives who gave the example of the bench chemist "who simply chooses not to pursue his curiosity about pregnancy-related drugs because he knows that the firm's senior management is unlikely to fund later and more costly stages of the development process for such a high-hazard product." P. Reuter, *The Economic Consequences of Expanded Corporate Liability: An Exploratory Study* (The RAND Corp. 1988) 25-27.

Burt Rutan, the designer and pilot of Voyager (the first airplane to fly non-stop around the world) stopped selling his construction plans for innovative airplanes in 1985 because he feared potential lawsuits that might ensue from crashes of home-built planes based on his designs. P. Huber, at 156. For similar reasons, a Virginia engineer whose son was crippled in a motorcycle accident had to abandon his business of designing better hand controls for cars used by the handicapped. Michael Brody, *When Products Turn Into Liabilities*, Fortune, March 3, 1986 at 60. In order for such innovative thinkers to share their ideas with the world they must risk all that they own, as insurance is generally cost prohibitive for such small businesses, if available at all.

Universities, fearful of liability concerns, are refusing to license patents to small companies fearful that anyone suing the company will also try for the university's deep pocket. *Does the Fear of Litigation Dampen the Drive to Innovate*, The New York Times, May 12, 1987, p.1.

Companies that choose to pursue research in spite of the potential for high punitive damage awards will need to install more layers of management to further supervise product quality and access potential risks. The cost for the increased supervision will likely directly reduce

funds available for research. Further, the presence of these additional management layers and the protocols involved in decision making could encumber the otherwise free development process.

D. EXCESSIVE PUNITIVE DAMAGES WEAKEN U.S. COMPETITIVENESS ABROAD

The prospect of uncertain legal risk undoubtedly has effected U.S. competitiveness abroad. "More so than any other economy, the United States today depends critically on its ability to innovate, and to capture the benefits from innovation, for its economic prosperity." D. J. Teece, *The Competitive Challenge: Strategies for Industrial Innovation and Renewal*, 3 (1987). As mentioned previously the U.S. has lost its leadership role in the contraceptive area. Among other industries, the U.S. is also losing its dominant position in aircraft production. In 1979 the domestic aircraft industry produced 18,000 planes, but in 1986 only 1500 were produced, with a corresponding decrease in employment of 70%. *Product Liability (Part I): Hearings before the subcommittee on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Congress, 1st Sess. 550 (1987) (statement by Frederick B. Sontag, President, Unison Industries and Chairman, Product Liability Committee, General Aviation Manufacturers Association).

Punitive damages are basically unknown in civil law countries and rare in Great Britain and Canada. R. Mahoney, at 1396; B. Chapman and M. Trebilcock, *Punitive Damages Divergence in Search of a Rationale*, 40 Ala. L. Rev. 741, 745-758. If the legal environment

becomes too oppressive in the United States, it is not inconceivable that U.S. manufacturers will refuse to sell their products domestically. At Norplant, an implantive contraceptive that releases a hormone for five years, was developed by the New York Population Council; it is marketed in five countries but no American company has dared to market it at home. P. Huber at 155. These manufacturers may move their operations abroad in order to get closer to their markets and get favorable tax and tariff treatment resulting in lost jobs for Americans.

E. EXCESSIVE PUNITIVE DAMAGES ADVERSELY EFFECT AGENCY RELATIONSHIPS WHICH ARE IMPORTANT TO THE PRESENT AND FUTURE SUCCESS OF AMERICAN BUSINESSES.

The effects of potentially unreasonable punitive damages awards are somewhat easy to comprehend in product development situations; new products will not be developed. However, the United States, while still a manufacturing leader, is becoming more service oriented. In order to remain a leader in the service sector, American businesses must become even more innovative in how they use their skilled personnel.

One very important way for American businesses to remain competitive in the service industry sector is to develop their use of agency relationships. Courts need to clearly define when and to what degree principals will be liable for acts of their agents, particularly in the area of potential punitive damages, so that businesses can make knowledgeable risk assessments of whether to use agents. Economics often dictates that, if a business is to provide a service in a particular area it must use an

agent as the costs of an employee would not be cost efficient. If businesses perceive that there is a possibility that they may be liable for punitive damages from the acts of the agent, the service will not be provided.

Agency relationships are important to American businesses and competitiveness for at least four reasons. First, many businesses are ideally suited to principal-agent relationships as opposed to an employer-employee relationship, such as the real estate industry and the insurance industry. Second, small businesses, like those "garage businesses" started by Ross Perot and Walt Disney, require agents to sell their products and supply services, as small businesses cannot hire full time specialists. Third, with a projected shortage of skilled workers, America will need to lure homemakers back into the work place; many returning homemakers will probably want to work as agents in their specialized field as this will allow for shorter or more flexible hours than full-time work. Fourth, in order to remain a world competitor with a shortage of skilled labor, skilled workers will have to share their expertise with several businesses, agency relationships will be invaluable for many of these situations. Further, many talented people do not want to work as employees as they enjoy the flexibility and tax benefits they receive by being self employed agents.

As agency relationships generally allow the agent more autonomy than an employee, courts must realize, in determining if punitive damages are justified, that a principal has much less supervisory control than an employer. Secondly, as agency relationships will become more common, courts should not hold principals vicariously liable in punitive damages for the acts of their agents if the principals made reasonable back-

ground checks of the agent and otherwise exercised responsible standards of care.

II. PUNITIVE DAMAGE AWARDS OF MORE THAN DOUBLE THE COMPENSATORY AWARD ARE JUSTIFIED IN ONLY FOUR CIRCUMSTANCES.

While there are circumstances where punitive damages may be appropriate, there are only four situations where punitive damages multiples of compensatory damages above two are justified.

First, where the actual damages are low as compared to the legal cost of bringing the action and large multiples are required to encourage "private attorneys general" type actions. *See Roginsky v. Richardson-Merrell*, 378 F.2d 832, 841 (2d Cir. 1967) (J. Friendly writing for the majority). This situation is easily shown by the plaintiff's attorney's actual time and expenses.

Second, where the defendant may conceal the injury from a large number of victims, large multiples are required to destroy the defendant's economic incentive to maintain its behavior and pay the damages. For example in *Boise Dodge v. Clark*, 92 Idaho 902, 453 P.2d 55 (1969), the defendant car dealership rolled back odometers on the demonstrator cars it sold representing them as new. The court justified a punitive damage award of approximately 35 times the compensatory damages as it estimated that few purchasers would discover the dealership's egregious behavior. The court held that the punitive damage multiple would have to be sufficient to destroy the defendant's economic incentive to maintain the practice. It is also important to note that

the compensatory award was only \$350.

Thirdly, large multiples are also justified where the defendant actually considered that its actions would still be cost efficient even if it had to pay punitive damages of a small multiple. See *Grenshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

Lastly, large multiples are also justified where the defendant has been found "guilty" of similar intentional or reckless behavior and punitive damages were assessed; the defendant had notice of its "criminal" activity by "conviction" of a similar offense and still committed the "crime".

The burden should be on the plaintiff when requesting punitive damages to show that one of the four situations above exists, thus entitling the plaintiff to a punitive damages multiple greater than two. The plaintiff should have little difficulty making a showing sufficient to shift the burden to the defendant if any of these situations indeed exist.

It is important to note that many groups and commentators even restrict the multiple to two where there are large compensatory awards. E.g., American College of Trial Lawyers, *Report on Punitive Damages* 15 (1989).

Plaintiff's lawyers may argue that there is a fifth situation where large punitive damages multiples are justified; that being where the defendant is very wealthy. The standard argument is that large punitive damages are required to "get their attention" where smaller awards are satisfactory to gain the attention of less wealthy defendants. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 45-46 (1982). If this reasoning is correct, all punitive damages assessed

against large corporations would have to be at least six or seven figures. *Id.* This reasoning tends to equate large corporations to extremely wealthy individuals. A corporation, however, cannot be viewed simply as an entity; it is an assemblage of individuals and stockholders. See *Id.* at 15.

It is important to note that there is no evidence that punitive damages actually do deter businesses, especially corporations, from unethical behavior. E. D. Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala. L. Rev. 1053, 1062 (1989).

Punitive damages of any amount bring media attention; and extremely large awards give rise to a great deal of media attention. Adverse media attention often causes damage to the business's reputation, resulting in lost profits. See *Roginsky v. Richardson-Merrell*, 378 F.2d 832, 841 (1967). Far worse than adverse news coverage is the closing of a business. As Judge Friendly noted, "a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future . . ." *Id.* The loss of jobs, increased insurance premiums, and more expensive products are all costs borne by the general public. While outrageous behavior must be checked, it is the average person or consumer who ultimately pays for every award issued in a court of law.

IV. CONCLUSION

This Court should consider the extrajudicial impact of exorbitant punitive damages on American businesses and the United States economy. Definite standards must be established for courts to follow when determining the amount of punitive damages to award. Accordingly, Amicus respectfully requests that the decision of the Alabama Supreme Court be reversed.

Respectfully submitted,

Robert L. Barr, Jr.*

G. Stephen Parker

Robert B. Baker, Jr.

Attorneys for Amicus Curiae

Southeastern Legal Foundation, Inc.
2900 Chamblee Tucker Road
Building 4
Atlanta, Georgia 30341
(404)458-8313

June, 1990

*Counsel of Record

27
No. 89-1279

Supreme Court, U.S.

FILED

JUN 1 1990

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN
and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE NATIONAL ASSOCIATION OF
WHOLESALE-DISTRIBUTORS,
NMTBA-THE ASSOCIATION FOR
MANUFACTURING TECHNOLOGY,
THE RISK AND INSURANCE MANAGEMENT SOCIETY,
AND THE PRODUCT LIABILITY ALLIANCE
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:

HOWARD W. GREENE
Counsel

JAMES T. MCINTYRE
Of Counsel

THE RISK AND INSURANCE
MANAGEMENT SOCIETY
205 E. 42nd Street

New York, New York 10017
(212) 286-9292

VICTOR E. SCHWARTZ
CLIFTON S. ELGARTEN *
LIBERTY MAGARIAN
SCOTT L. WINKELMAN

CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2523

* *Counsel of Record for
Amici Curiae*

June 1, 1990

QUESTIONS PRESENTED

1. Whether post-trial judicial review available in connection with punitive damages awards overcomes the fundamental inadequacies in the standards and procedures for imposing punitive damages in the first instance.
2. Whether due process requires that punitive damages awards rest, at least, upon clear and convincing evidence.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE CONSTITUTIONAL INADEQUACIES IN EXISTING PUNITIVE DAMAGES SCHEMES ARE NOT SAVED BY POST-TRIAL REVIEW OF JURY VERDICTS	7
II. DUE PROCESS REQUIRES THAT PUNI- TIVE DAMAGES AWARDS BE SUPPORTED, AT A MINIMUM, BY CLEAR AND CONVINC- ING EVIDENCE	14
CONCLUSION	25
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
<i>Abel v. Conover</i> , 104 N.W.2d 684 (Neb. 1960)....	19
<i>Ace Truck & Equip. Rentals, Inc. v. Kahn</i> , 746 P.2d 132 (Nev. 1987)	11
<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	passim
<i>Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.</i> , 109 S. Ct. 2909 (1989)	17, 18
<i>City of Lowell v. Massachusetts Bonding & Ins. Co.</i> , 313 Mass. 257, 47 N.E.2d 265 (1943)	19
<i>Cross v. Ledford</i> , 161 Ohio St. 469, 120 N.E.2d 118 (1954)	21
<i>Cuellar v. Texas Empl. Comm'n</i> , 825 F.2d 930 (5th Cir. 1987)	8
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	8
<i>Day v. Woodworth</i> , 54 U.S. (13 How.) 363 (1852)	17
<i>Eichenseer v. Reserve Life Ins. Co.</i> , 894 F.2d 1414 (5th Cir. 1990)	18
<i>Gazette, Inc. v. Harris</i> , 229 Va. 1, 325 S.E.2d 713, cert. denied, 472 U.S. 1032 (1985)	11
<i>George v. International Society for Krishna Consciousness of California</i> , 262 Cal. Rptr. 215 (Cal. App. 1989)	13
<i>Gertz v. Welch, Inc.</i> , 418 U.S. 323 (1974)	17, 20, 22
<i>Grimshaw v. Ford Motor Co.</i> , 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)	11
<i>Hammond v. City of Gadsden</i> , 493 So. 2d 1374 Ala. 1986)	10
<i>Hanch v. K.F.C. Nat'l Mgmt. Corp.</i> , 615 S.W.2d 28 (Mo. 1981) (en banc)	11
<i>Hobson v. Eaton</i> , 399 F.2d 781 (6th Cir. 1968)....	21
<i>International Bhd. of Electrical Workers v. Foust</i> , 442 U.S. 42 (1979)	18, 22, 23
<i>Kammerer v. Western Gear Corp.</i> , 618 P.2d 1330 (Wash. 1980)	20
<i>Ex parte Lange</i> , 85 U.S. (18 Wall.) 163 (1873)....	5
<i>Leimgruber v. Claridge Assocs., Ltd.</i> , 73 N.J. 450, 375 A.2d 652 (1977)	10
<i>Linthicum v. Nationwide Life Ins. Co.</i> , 150 Ariz. 326, 723 P.2d 675 (1986) (en banc)	15

TABLE OF AUTHORITIES—Continued

	Page
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	8, 14
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	16, 19
<i>Memphis Light, Gas & Water Div. v. Craft</i> , 436 U.S. 1 (1978)	8
<i>O'Neal Ford, Inc. v. Davie</i> , 299 Ark. 45, 770 S.W.2d 656 (1989)	10
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981), overruled, <i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	8
<i>Ricard v. State</i> , 390 So. 2d 882 (La. 1980)	19
<i>Rivera v. Minnich</i> , 483 U.S. 574 (1987)	16, 22
<i>Robinson v. Mack Trucks, Inc.</i> , 426 N.W.2d 220 (Minn. Ct. App. 1988)	10
<i>Roginsky v. Richardson-Merrell, Inc.</i> , 378 F.2d 832 (2d Cir. 1967)	18
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982)	passim
<i>Simpson v. Pittsburgh Corning Corp.</i> , No. 89-7742 (2d Cir. April 16, 1990)	23
<i>Stambaugh v. International Harvester Co.</i> , 106 Ill. App. 3d 1, 435 N.E.2d 729 (1982), rev'd on other grounds, 102 Ill.2d 250, 464 N.E.2d 1011 (1984)	11
<i>Texaco, Inc. v. Pennzoil Co.</i> , 626 F. Supp. 250 (S.D.N.Y.), aff'd in part and rev'd in part, 784 F.2d 1133 (2d Cir. 1986), rev'd, 481 U.S. 1 (1987)	13
<i>Texaco, Inc. v. Pennzoil Co.</i> , 729 S.W.2d 768 (Tex. Ct. App. 1987)	13
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927)	5
<i>Tuttle v. Raymond</i> , 494 A.2d 1353 (Me. 1985)	15
<i>United States v. Choteau</i> , 102 U.S. 603 (1881)	17
<i>United States v. Fatico</i> , 458 F. Supp. 388 (E.D.N.Y. 1978), aff'd, 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980)	23
<i>United States v. Halper</i> , 109 S. Ct. 1892 (1989)	5, 17
<i>Villella v. Waikem Motors, Inc.</i> , 45 Ohio St. 3d 36, 543 N.E.2d 464 (1989)	9
<i>Vitek v. Jones</i> , 445 U.S. 480 (1980)	24

TABLE OF AUTHORITIES—Continued

	Page
<i>Wangen v. Ford Motor Co.</i> , 97 Wis.2d 260, 294 N.W. 2d 437 (1980)	15
<i>In re Winship</i> , 397 U.S. 358 (1970)	<i>passim</i>
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971)	19
<i>W. M. Bashlin Co. v. Smith</i> , 277 Ark. 406, 643 S.W.2d 526 (1982)	10
<i>Woodby v. INS</i> , 385 U.S. 276 (1966)	16
<i>Zarrella v. Robinson</i> , 460 A.2d 415 (R.I. 1983)	10
STATUTES	
Ala. Code § 6-11-20(a) (Supp. 1989)	15
Alaska Stat. § 09.17.020 (Supp. 1988)	15
Cal. Civ. Code § 3294(a) (West Supp. 1990)	15
Colo. Rev. Stat. § 13-25-127(2) (Supp. 1979)	15, 24
Fla. Stat. Ann. § 768.73(1)(b) (West Supp. 1989)	15
Ga. Code Ann. § 51-12.51(b) (Supp. 1989)	15
Ind. Code Ann. § 34-4-34-2 (Burns 1986)	15
Iowa Code Ann. § 668A.1(1)(a) (West Supp. 1989)	15
Kan. Civ. Proc. Code Ann. § 60-3701(c) (Vernon Supp. 1989)	15
Ky. Rev. Stat. Ann. § 411.184(2) (Michie/Bobbs-Merrill 1988)	15
Minn. Stat. Ann. § 549.20, subdivision 1 (West 1988)	15
Mont. Code Ann. § 27-1-221(5) (1987)	15
Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1989)	15
N. Dak. Cent. Code § 32-03.2-11 (Supp. 1987)	15
N.H. Rev. Stat. Ann. § 507:16 (Supp 1988)	20
Ohio Rev. Code Ann. § 2307.80 (Anderson 1987)	15
Okla. Stat. Ann. tit. 23, § 9 (West 1987)	15
Or. Rev. Stat. § 41.315(1) (1987)	15
S.C. Code § 15-33-135 (Law. Co-op. Supp. 1989)	15
S. Dak. Codified Laws Ann. § 21-1-4.1 (1987 Rev.)	15
Utah Code Ann. § 78-18-1(a) (1989)	15

TABLE OF AUTHORITIES—Continued

PERIODICALS AND PUBLICATIONS	Page
Barnes, <i>Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chambers</i> , 6 Temp. L. Rev. 221 (1972)	4
E. Cleary, <i>McCormick on Evidence</i> (3d ed. 1984)	16, 21
Comment, <i>Criminal Safeguards and the Punitive Damages Defendant</i> , 34 U. Chic. L. Rev. 408 (1967)	18
Demarest & Jones, <i>Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?</i> , 18 St. Mary's L.J. 797 (1987) ..	7
F. James, <i>Civil Procedure</i> (1965)	21
Landes & Posner, <i>New Light on Punitive Damages</i> , 10 Reg. 33 (Sept.-Oct. 1986)	12
Mahoney & Littlejohn, <i>Innovation on Trial: Punitive Damages Versus New Products</i> , 246 SCI-ENCE 1395 (Dec. 15, 1989)	13-14
Morris, <i>Punitive Damages in Tort Cases</i> , 44 Harv. L. Rev. 1173 (1931)	11
M. Peterson, S. Sarma, & M. Shanley, <i>Punitive Damages: Empirical Findings</i> (RAND R-3311-ICJ 1987)	12
N.Y. Times, May 19, 1990, at 50, col. 3	13
United Press International news release, keyword: Bendectin (Mar. 9, 1990)	13
United Press International news release, keyword: Sapon (Nov. 22, 1989)	13
United States General Accounting Office, <i>Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness, Committee on Energy and Commerce: Product Liability: Verdicts and Case Resolution in Five States</i> 40-47 (1989)	12
W. Prosser, J. Wade & V. Schwartz, <i>Cases And Materials On Torts</i> (8th ed. 1988)	17
Wheeler, <i>The Constitutional Case for Reforming Punitive Damages Procedures</i> , 69 Va. L. Rev. 269 (1983)	9

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN
and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

**BRIEF OF THE NATIONAL ASSOCIATION OF
WHOLESALE-DEALERS,
NMTBA-THE ASSOCIATION FOR
MANUFACTURING TECHNOLOGY,
THE RISK AND INSURANCE MANAGEMENT SOCIETY,
AND THE PRODUCT LIABILITY ALLIANCE
AS AMICI CURIAE IN SUPPORT OF PETITIONER**

INTEREST OF THE AMICI CURIAE

Amici, The National Association of Wholesaler-Dealers, NMTBA-The Association For Manufacturing Technology, The Risk and Insurance Management Society, and The Product Liability Alliance, with the consent of the parties, present this brief in support of the petitioner.¹

¹ Letters of consent have been filed with the Clerk of the Court.

The National Association of Wholesaler-Distributors is a federation of approximately 117 national wholesale trade associations, 57 state and regional trade associations, and 2000 individual wholesale distribution firms. It represents approximately 40,000 companies with 150,000 places of business across the United States. Its purpose is to advocate its members' interests on national public policy issues affecting the entire wholesale distribution industry. The enormous legal costs, loss in productive time, and stigma attendant upon awards of punitive damages, under the system of private punishment exemplified by this case, threaten the well-being of each participant in the wholesale distribution industry.

NMTBA-The Association For Manufacturing Technology consists of over 300 firms that produce and sell equipment, products or software used in manufacturing machinery in the United States. Its members produce the vast majority of this country's metal cutting and metal forming machines. NMTBA provides representation for its members in state and national government affairs, actively promotes exports, maintains the world's largest data base on metalworking industry statistics, and spearheads formulation of safety and technical standards. NMTBA has an interest in this case because, among other things, the threat of unrestrained punitive damages awards, and the legal costs that must be incurred in obtaining reversal or remittitur, severely disadvantage the manufacturing machinery industry in attempts to compete with foreign business.

The Risk and Insurance Management Society, the world's largest association of risk management professionals, consists of approximately 4,400 industrial and service corporations, governmental bodies and nonprofit organizations. Risk management professionals analyze risks that companies might encounter and offer advice about the most effective methods of avoiding such risks and insuring against related losses. The Risk and In-

surance Management Society is interested in this case because imprecise and standardless punitive damages systems make it impossible for risk management professionals to calculate with any certainty when and in what amounts punitive damages may be imposed.

The Product Liability Alliance consists of more than 300 manufacturing businesses, wholesaler-distributors, and trade associations from a wide range of industries. The Alliance was formed in 1981 primarily for the purpose of seeking uniform and rational federal product liability laws. This case is of interest to the Alliance because the current unbounded punitive damages system is a burden on its members' ability to produce and distribute products throughout the United States.

Given their diverse perspectives, amici are well positioned to dramatize for the Court the difficulties facing all businesses operating under the current, essentially standardless, punitive damages system—difficulties that are aggravated by an equally standardless system for judicial review of punitive awards.

STATEMENT

This case presents a scheme of state-inflicted punishment under which the decision whether to seek punishment, and how best to pursue that objective, is left to private parties, rather than government officials. There is no disputing that punitive damages, in the form of private civil remedies, have been with us for some time, and we do not question the basic premises of such a system. But there is also no disputing that entrusting the power to seek potentially ruinous punishment to private citizens raises the potential for abuse. For example, one historian has noted that:

The overwhelming majority of prosecutions [in England's Star Chamber] were brought by private parties, often to shore up a purely civil suit All prosecutions were ostensibly on the King's behalf,

and therefore for the safety of the state and good order in the commonwealth However, few prosecutions were motivated by any public concern but stemmed rather from personal considerations, mainly profit or revenge. The court was in a poor position to influence let alone control its private litigants. [Thus, the Star Chamber] was too useful a tool of the vexatious litigant and the near-vexatious litigant to want for business²

Where the penalty exacted flows *not* into the coffers of the state, but directly into the pocket of the private prosecutor, the potential for abuse is especially great: The private prosecutor, who will reap the financial rewards of his advocacy, is thereby given strong incentive to inflame the passions of the jury to inflict ever more severe degrees of punishment.

Such potential for abuse does not argue against the system of private punitive damages in general. But it does argue strongly for the need to deploy fully those mechanisms that we have historically recognized as proper for curbing abuse and arbitrariness in connection with the imposition of punishment: strict procedural protections and clear legal standards. That need is not satisfied by the type of punitive damages scheme at issue in this case, under which

- the decision whether to impose punishment at all in a given case (as in this case) is left largely to the decisionmaker's discretion, based on broadly framed questions about whether punishment is deserved;
- juries determine the *severity* of punishment as a matter of discretion, essentially unchecked and unguided by any legal formula, standard, or ceiling established by law;
- punishment may be imposed under a burden of proof that permits the jury to inflict punishment

² Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chambers*, 6 Temp. L. Rev. 221, 226 (1962) (footnote omitted).

even though it may have substantial doubts about whether the defendant did anything wrong or culpable;³

- the standards used by the courts to review the jury's decision are no less vague than the standards for inflicting punishment in the first instance;

- citizens may be punished repeatedly for essentially the same conduct or decision.⁴

Amici think it plain that such a system does not afford the kind of process that is constitutionally due a defendant potentially subject to ruinous punishment. Whether considered in terms of its individual constituent parts or in its totality, the system of punishment at issue in this case is so lawless that it is fundamentally inconsistent with the basic premises of our legal tradition.

Beyond this short statement, however, this brief will not attempt to present an overview of the defects in the present system of punitive damages, or address issues expectably developed in the briefs of the parties or other *amici*. In keeping with this Court's rules on *amicus* practice, this brief will instead focus on two issues, raised by petitioner, that we believe will not be the central focus of any other brief submitted in this case. *First*, we discuss whether post-verdict procedures, including the availability of remittitur, can salvage an otherwise constitu-

³ *Cf. Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law").

⁴ *Cf. Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence"); *United States v. Halper*, 109 S. Ct. 1892 (1989) (double jeopardy protections are triggered by civil fines of punitive character).

tionally infirm system of punishment.⁵ *Second*, we discuss one of the significant defects in the system described above—namely, an impermissibly lenient standard of proof—and explain why application of the prevailing “preponderance of the evidence” standard does not suffice to assure defendants due process of law.⁶

SUMMARY OF ARGUMENT

I. The availability of conventional post-verdict mechanisms for reviewing punitive awards cannot obviate constitutional deficiencies in the methods for imposing such awards in the first instance. *Post hoc* remedies are not an adequate substitute for timely procedural safeguards. This is particularly true in the context of punitive damages, because existing review mechanisms are neither designed nor sufficient to remedy the sheer arbitrariness that governs jury assessment of punitive awards.

II. The Due Process Clause of the Fourteenth Amendment requires that punitive damages awards be supported at least by clear and convincing evidence. Any lesser standard—such as the “reasonably satisfied from the evidence” standard imposed in this case, or the more common “preponderance of the evidence” standard traditionally applied in civil cases—unduly exacerbates the risk of erroneously imposing punishment and underestimates the consequences of a punitive award.

⁵ See Petitioner Pacific Mutual Life Insurance Company’s Petition For Writ of Certiorari, February 7, 1990, at 26-29 (discussing remittitur and appellate review).

⁶ See *id.* at 10-11 (preserving constitutional challenges), at 24 (arguing for elevated burden of proof).

ARGUMENT

I. THE CONSTITUTIONAL INADEQUACIES IN EXISTING PUNITIVE DAMAGES SCHEMES ARE NOT SAVED BY POST-TRIAL REVIEW OF JURY VERDICTS

In the present case, the Alabama Supreme Court relied on, among other things, the availability of remittitur and other forms of post-verdict review in rejecting petitioner’s constitutional objections to Alabama’s punitive damages scheme. See *Pacific Mutual Life Ins. Co. v. Haslip et al.*, No. 87-482, slip op. at 13 (Sept. 15, 1989) (Appendix B to the petition for certiorari). That court’s conclusion echoes the frequently expressed view of proponents of the current punitive damages system that “[j]udicial controls provide sufficient procedural protection against excessive exemplary damage awards.”⁷ This claim lacks constitutional, analytical, or empirical foundation.

As an initial matter, it is generally *not* the case that even an elaborate system of post-trial review can salvage verdicts obtained on the basis of constitutionally deficient trial procedures. We know of no constitutional principle, for instance, that would excuse a state’s failure to afford a person the opportunity to be heard at trial so long as it afforded the defendant a close reading of the record on appeal and a chance to present argument in the course of appellate review. Likewise, this Court has determined that “[r]etrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.” *Santosky v. Kramer*, 455 U.S. 745, 757 (1982). The Court in *Santosky* went on to note that “we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous

⁷ Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 St. Mary’s L.J. 797, 815-16 (1987) (footnote omitted).

assessment of the 'cumulative effect' of state procedures." *Id.* at 757 n.9 (citation omitted).⁸ As in *Santosky*, this Court cannot condone manifold infirmities in this scheme of punishment merely because post-verdict remedies *may* offer *some* salvation in *some* circumstances.⁹

Moreover, where punishment is imposed by a jury without the benefit of standards, allowing judges to review that verdict to determine, for example, if it was "excessive," does little to remedy the underlying defects in the process. The question of excessiveness can only be meaningfully answered by reference to specific facts and relative to some established scale or measure. There will be many situations where an award is not facially exces-

⁸ Cf. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 20-21 (1978) (availability of injunction and post-termination remedies for improper stoppage of utility services without notice "would not be an adequate substitute for pre-termination review," since, *inter alia*, injunctive relief "will not provide the same assurance of accurate decisionmaking as would an adequate administrative procedure"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) ("a post-deprivation hearing here would be constitutionally inadequate" to correct for failure to afford timely administrative hearing); *Cuellar v. Texas Empl. Comm'n*, 825 F.2d 930, 936 (5th Cir. 1987) ("The existence of post-deprivation remedies through further administrative hearings, judicial review, or independent state-law based causes of action are irrelevant" to the question of the constitutional adequacy of firing procedures).

⁹ Limited exceptions to this principle have no application here. Thus, post-deprivation process may be sufficient in light of "the necessity of quick action by the State." *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Certainly no such urgency can be claimed in the present context. Post-deprivation process may also be adequate in the case of deprivations resulting from "random and unauthorized act[s] by a state employee" given "the impracticality of providing any meaningful predeprivation process" in that instance. *Parratt*, 451 U.S. at 539, 541. But this exception has no force where, as here, the challenge is not to random acts but to "established state procedure[s]." See *Logan*, 455 U.S. at 436 (rejecting analogy to *Parratt* for this reason).

sive (sufficient to inspire outrage and corrective action by a judge) but nonetheless lawless and inappropriate because not supported by clear standards in the first instance.

Thus, even if layers of judicial re-evaluation could, in some instances, compensate for procedural deficiencies at trial, the forms of review traditionally available in connection with awards of punitive damages are neither designed nor able to achieve this result. Trial court review of punitive awards is severely circumscribed; a standard formulation is whether an award is "so excessive as to be deemed a product of passion or prejudice" ¹⁰ Although "passion and prejudice" may undoubtedly taint a punitive damages determination,¹¹ judicial review that focuses on that issue tends to obscure the absence of articulated substantive and evidentiary standards for juries to observe in rendering such awards in the first instance. Therefore, review subject to a "passion or prejudice" or like inquiry may offer a vehicle for remedying injustice in some cases, but will not and cannot correct for institutionalized infirmities such as a lack of underlying legal standards.

Similar limitations characterize appellate review. Indeed, appellate courts are the first to acknowledge their limited capacity to assess the propriety of a punitive award. See, e.g., *Villella*, 543 N.E.2d at 469 ("[because] the trial judge is in the best position to determine whether

¹⁰ *Villella v. Waikem Motors, Inc.*, 45 Ohio St. 3d 36, 543 N.E.2d 464, 469 (1989).

¹¹ For a court to remit a punitive damages award on the ground that the amount awarded was based on passion and prejudice, but to leave unaltered the jury's findings on liability and compensatory damages, is to act on the untenable assumption that the same jury can be dispassionate and fair when deciding liability and compensatory issues, yet impassioned and prejudiced while contemporaneously deciding punitive damages issues. See *Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 301 (1983).

an award is . . . excessive . . . 'an [a]ppellate court hesitates to enter remittitur'") (citations omitted); *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1378-79 (Ala. 1986); *Robinson v. Mack Trucks, Inc.*, 426 N.W. 2d 220, 226 (Minn. Ct. App. 1988); *Zarrella v. Robinson*, 460 A.2d 415, 419 (R.I. 1983). The result, not surprisingly, is extreme reluctance on the part of appellate courts to trench on, or even conduct meaningful review of, punitive awards. The present case typifies this reluctance: the Alabama Supreme Court's review of the jury's punitive award was confined to the conclusory observation that "jury verdicts are presumed correct, and that presumption is strengthened when the presiding judge refuses to grant a new trial." Slip op. at 13 (App. B to petition for certiorari). Appellate review cannot be a constitutional substitute for inadequate trial court procedures when that review is premised on deference to the jury verdict, irrespective of the fact that the jury verdict was procured unconstitutionally.

Compounding the deficiencies in judicial controls is the fact that judges have no more clearly defined standards for reviewing punitive awards than juries have for pronouncing them.¹² Prevailing standards of review—which, in addition to the "passion or prejudice" standard, include whether an award "shocks the conscience of the court,"¹³ or whether the punitive award bears a "reason-

¹² The major difficulty in establishing the amount of the punitive damage recovery is the absence of any definitive standard or criterion to guide the trier of fact in determining the proper amount. And since reviewing courts similarly lack any specific standards by which to measure the damages, there is a corresponding difficulty in considering the propriety of such award on appeal . . .

Leimgruber v. Claridge Assocs., Ltd., 73 N.J. 450, 375 A.2d 652, 656 (1977) (citations omitted).

¹³ E.g., *O'Neal Ford, Inc. v. Davie*, 299 Ark. 45, 770 S.W.2d 656, 659 (1989) (quoting *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982)).

able relationship" to the corresponding compensatory award¹⁴—are themselves vague and subjective. As one commentator long ago observed, such tests are "probably more often a rationalization of results than a means of obtaining them. The proper ratio between actual damages and punitive damages is placed at a figure which supports the judge's view of the verdict. . . ." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1180 (1931). See also *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 746 P.2d 132, 135 (Nev. 1987) (citation omitted) ("one 'cannot avoid thinking' that the [passion or prejudice] rule is 'tailored to fit [the court's] feeling about the particular case before it'").¹⁵ The result, not surprisingly, is sharp and often inexplicable discrepancies between judicial attempts to reduce awards—for instance, from \$125 million to \$3.5 million (*Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 824-25, 174 Cal. Rptr. 348, 391 (1981)), from \$15 million to \$7.5 million to \$650,000 (*Stambaugh v. International Harvester Co.*, 106 Ill. App.3d 1, 435 N.E.2d 729, 747 (1982), *rev'd on other grounds*, 102 Ill.2d 250, 464 N.E.2d 1011 (1984)), and from \$10,000 to \$9,999 (*Hanch v. K.F.C. Nat'l Mgmt. Corp.*, 615 S.W.2d 28, 30 (Mo. 1981) (en banc)).¹⁶

¹⁴ E.g., *Gazette, Inc. v. Harris*, 229 Va. 1, 51, 325 S.E.2d 713, 747, *cert. denied*, 472 U.S. 1032 (1985).

¹⁵ For the Court's convenience, we have attached as an Appendix to this brief an informal survey of the prevailing standards for judicial review of punitive damages awards in the 50 states.

¹⁶ In any event, the fact that appellate courts are deciding issues that have been expressly left within the purview of a jury indicates that such courts are devoting an inordinate amount of time on issues which should have been addressed below. At a time when the appellate court systems are already overburdened, it is neither good sense nor good economy to expect appellate tribunals to correct all deficiencies plaguing trial systems, or to assume the duties of a trial court merely because the latter is not performing them properly.

If remittitur and other methods of trial court control were effective, one would expect a relatively modest incidence of appellate reversals of punitive awards. In fact, a study of all punitive damages awards in product liability cases reviewed by federal appellate courts between 1982 and mid-1985 revealed that sixty-nine percent were reversed or sharply reduced on appeal.¹⁷ Likewise, a more recent study undertaken by the United States General Accounting Office of product liability cases in five states over a two-year period found that (1) appellate courts reversed or remanded for retrials *all* punitive damages awards on which they ruled; (2) 18 of the 22 punitive damages verdicts studied were lowered by some post-trial method; and (3) awards were reduced less often and by a smaller percentage when the verdict included only compensatory damages.¹⁸ The frequency of reversal highlights the fundamentally arbitrary nature of the underlying process and the inability of remittitur alone to compensate for such arbitrariness.

Moreover, none of the existing mechanisms for reviewing punitive awards can remedy the prejudice and costs

¹⁷ See Landes & Posner, *New Light on Punitive Damages*, 10 Reg. 33, 34-35 (Sept.-Oct. 1986). In comparison, less than one-third of the trial court decisions in favor of plaintiffs but not awarding punitive damages were reversed on appeal. *Id.* at 35.

¹⁸ United States General Accounting Office, *Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness, Committee on Energy and Commerce: Product Liability: Verdicts and Case Resolution in Five States* 40-47 (1989).

These findings are consistent with similar studies. Thus, the Institute for Civil Justice of The RAND Corporation examined awards of punitive damages in certain civil jury trials concluded in San Francisco County, California, and Cook County, Illinois, between 1979 and 1983. See M. Peterson, S. Sarma, & M. Shanley, *Punitive Damages: Empirical Findings* viii (RAND R-3311-ICJ 1987). The Institute determined that post-trial actions reduced punitive damages awards in half of those trials and that, as a result of post-trial action, only half of the money awarded by juries in those cases was actually received by plaintiffs. *Id.*

that often befall the target of a punitive award irrespective of the success of later appeals. For example, in order even to maintain an appeal of an excessive punitive damages award, a defendant may be required to post a supersedeas bond which may necessitate the defendant's liquidation.¹⁹ Likewise, the defendant may have to place its property in receivership pending appeal, thereby crippling its ability to carry on as a viable entity.²⁰ Equally damaging could be a severe drop in the price of a defendant's stock in response to an excessive punitive award.²¹ And an erroneous punitive damages award could so malign the reputation of a company or product that the defendant would cease making or marketing the product even if the punitive award were later reduced.²² These "real life" illustrations demonstrate that judicial

¹⁹ See *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250 (S.D.N.Y.), *aff'd in part and rev'd in part*, 784 F.2d 1133 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987). In *Pennzoil*, the appellate court ultimately determined that the punitive damages award was three times as great as it should have been.

²⁰ See *George v. International Society for Krishna Consciousness of California*, 262 Cal. Rptr. 215, 216 (Cal. App. 1989). In *Krishna Consciousness*, the trial court reduced the jury's award of \$32 million to \$9.7 million, and the court of appeals further reduced it to \$2.9 million.

²¹ See, e.g., United Press International news release, keyword: Sapon (Nov. 22, 1989).

²² See United Press International news release, keyword: Bendectin (Mar. 9, 1990). Recently, the Monsanto Company, a chemical and drug producer, cancelled its plans to market a fiber claimed to be an effective substitute for asbestos but lacking the health risks associated with asbestos. Monsanto cited as the reason for its decision the belief that its product would nevertheless attract lawsuits from trial attorneys who make their living by suing asbestos companies. *N.Y. Times*, May 19, 1990, at 50, col. 3. This unfortunate decision was predictable: it is logical that the manufacturer of any asbestos substitute, however safe, might cancel plans to market the product because "[a] whole generation of lawyers has been schooled in asbestos liability theories that could

review is "apt to be a lengthy and speculative process, which . . . [may] never make the complainant entirely whole." *Logan*, 455 U.S. at 436-37. Such review cannot substitute for timely procedural safeguards. *Id.*

Finally, reliance on broad review mechanisms, which allow a court to substitute its judgment for that of the jury, denigrates the central role of juries in our system of jurisprudence. If, as appears to be the premise of private punitive damages regimes, it is the jury's responsibility to impose civil punishment, this goal is severely undercut by wholesale dependence on remittitur and other review devices. *Amici* suggest that the solution to inappropriate punitive awards is not to count on judges to correct them, but to provide juries with proper guidelines to enable them to carry out their historic duties in the first instance.

Judicial review can supplement, but cannot substitute for, institutionalized processes to protect the defendant at trial. Existing review procedures are stop-gap measures that, however well-intended, serve only to obscure the magnitude of the problems plaguing the underlying punitive damages schemes. This is not to discount the critical role played by judges in attempting to provide some check on the unbridled discretion of juries to impose punitive damages. It is to suggest, however, that post-verdict review offers the civil defendant too little, too late to satisfy due process.

II. DUE PROCESS REQUIRES THAT PUNITIVE DAMAGES AWARDS BE SUPPORTED, AT A MINIMUM, BY CLEAR AND CONVINCING EVIDENCE

In assessing punitive damages against petitioner in this case, the Alabama jury was left free to impose punitive damages in any amount so long as it was "reason-

possibly be turned against this or any similar substitute." Mahoney & Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCIENCE 1395 (Dec. 15, 1989).

ably satisfied from the evidence" that a fraud had been perpetrated, and felt, in the exercise of its "discretion," that punishment was in order.²³ This cryptic formulation of the burden of proof is akin to the "preponderance of the evidence" standard normally applied in civil cases. And we take it as clear that it is less exacting than the "clear and convincing evidence" standard presently applied in at least twenty-two states, including, now, Alabama itself, before punitive damages may be imposed.²⁴ This case thus squarely presents the question whether the Due Process Clause of the Fourteenth Amendment is satisfied by a standard of proof for punitive damages less demanding than clear and convincing evidence.

Amici submit that due process requires more. In determining whether due process mandates a burden of

²³ The Alabama trial court's full charge to the jury on punitive damages is included in petitioner's brief.

²⁴ At least nineteen states have enacted legislation requiring that punitive awards be supported by clear and convincing evidence. See Ala. Code § 6-11-20(a) (Supp. 1989); Alaska Stat. § 09.17.020 (Supp. 1988); Cal. Civ. Code § 3294(a) (West Supp. 1990); Fla. Stat. Ann. § 768.73(1)(b) (West Supp. 1989); Ga. Code Ann. § 51-12-51(b) (Supp. 1989); Ind. Code Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1(1)(a) (West Supp. 1989); Kan. Civ. Proc. Code Ann. § 60.3701(c) (Vernon Supp. 1989); Ky. Rev. Stat. Ann. § 411.184(2) (Michie/Bobbs-Merrill 1988); Minn. Stat. Ann. § 549.20 subdivision 1 (West 1988); Mont. Code Ann. § 27-1-221(5) (1987); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1989); N. Dak. Cent. Code § 32-03.2-11 (Supp. 1987); Ohio Rev. Code Ann. § 2307.80 (Anderson 1987); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. § 41.315(1) (1987); S.C. Code Ann. § 15-33-135 (Law. Co-op. Supp. 1989); S. Dak. Codified Laws Ann. § 21-1-4.1 (1987 Rev.); Utah Code Ann. § 78-18-1(a) (1989). Three other states have adopted this burden of proof as a matter of common law. See *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986) (en banc); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W. 2d 437 (1980). A twenty-third state has by legislation subjected punitive damages to the even more demanding "beyond a reasonable doubt" burden of proof. Colo. Rev. Stat. § 13-25-127(2) (Supp. 1979).

proof more demanding than the "preponderance of the evidence" standard applied in most civil cases,²⁵ this Court "has engaged in a straightforward consideration" of the factors identified in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Santosky v. Kramer*, 455 U.S. at 754 (applying *Eldridge* factors to New York parental termination scheme). That is, the Court has looked to "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedures." *Id.* See also *Eldridge*, 424 U.S. at 335 (identifying factors); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (same).

In the context of Alabama's punitive damages scheme in particular, and punishment in general, the private interest at stake—the interest in avoiding erroneously imposed punishment—is considerable; the risk of error is very substantial; and there is no countervailing governmental interest. Under settled due process analysis, therefore, punitive damages cannot be administered absent, at least, clear and convincing evidence.

1. The first due process consideration turns on "the nature of the private interest threatened . . ." *Santosky*, 455 U.S. at 758. Cf. *Addington*, 441 U.S. at 425 (considering "extent of the individual's interest"). Concededly, the monetary nature of punitive awards would not, standing alone, pose as dire a threat to the civil defendant as, say, civil commitment (*Addington*, 441 U.S. at 425-26) or deportation (*Woodby v. INS*, 385 U.S. 276, 285 (1966)).

²⁵ See *Rivera v. Minnich*, 483 U.S. 574, 577 (1987) ("The preponderance of the evidence standard . . . is the standard that is applied most frequently in litigation between private parties in every State"); E. Cleary, *McCormick on Evidence* § 339, at 956 (3d ed. 1984) (preponderance standard governs "the general run of issues in civil cases").

But punitive damages are imposed to punish. They are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974). See also W. Prosser, J. Wade & V. Schwartz, *Cases And Materials On Torts*, 528-29 (8th ed. 1988) (punitive damages "are awarded . . . for the purpose of punishing the defendant, of admonishing him not to do it again, and of deterring others from following his example"); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852) ("By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured"); *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2926 (1989) (O'Connor, J., concurring in part, dissenting in part) ("punitive damages serve the same purposes—punishment and deterrence—as the criminal law").²⁶ In meting out punishment, society registers a moral judgment about the character of the punished individual.²⁷ Our jurisprudence has historically required that such solemn decisions be made only with the utmost care and circumspection. It is for this reason that a heightened burden of proof is "critical [to] the moral force of the criminal law" (*In re Winship*, 397 U.S. 358, 364 (1970)), just as it is in other circumstances in which punishment is imposed, *id.* at 365 ("The same con-

²⁶ In assessing the character and gravity of a sanction, "the labels 'criminal' and 'civil' are not of paramount importance." *United States v. Halper*, 109 S. Ct. at 1901. Likewise, it has long been recognized that whether a sanction serves a reparative or punitive purpose "is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603, 611 (1881).

²⁷ Punitive damages arising from tortious injury virtually always entail an element of opprobrium. The same is not true of most civil fines. Civil fines are generally imposed for failure to adhere to strict, clearly defined standards that govern one's trade or business, often irrespective of moral culpability.

siderations . . . demand extreme caution" in juvenile proceedings, whether they be characterized as criminal or civil).

The interest implicated by punitive awards is defined not merely by their purpose, but by their consequences as well. Like other forms of punishment, punitive damages are by their nature designed to "engender adverse social consequences" (*Addington*, 441 U.S. at 425-26 (describing effect of civil commitment)), including, in many instances, debilitating stigma. Courts and commentators alike have emphasized the "potentially devastating" ramifications of an award of punitive damages for the character, reputation, business and good will of the civil defendant. *Browning-Ferris*, 109 S. Ct. at 2923 (Brennan, J., concurring). See, e.g., *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979) ("the impact of [punitive awards] is unpredictable and potentially substantial"); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chic. L. Rev. 408, 417 (1967) (citation omitted) (punitive awards have "'momentous and serious' . . . consequences" for civil defendant); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 842 (2d Cir. 1967) (Friendly, J.) (noting "serious" consequences for defendant of punitive award).

The private interest at stake is thus far more than "mere loss of money." *Addington*, 441 U.S. at 424. Simply put, punishment is different. See *Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1419 (5th Cir. 1990) (Jones, J., dissenting from denial of rehearing *en banc*) ("The goal of punishment critically distinguishes punitive damages from other common law remedies . . ."). Indeed, this Court has recognized that the heightened "clear and convincing evidence" standard is often imposed to "reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." *Addington*, 441 U.S. at 424. See also *In re Winship*, 397 U.S. at 363 (heightened standard required

in criminal cases in part because of "the certainty that [the accused] would be stigmatized by the conviction"). *Accord Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("where the State attaches 'a badge of infamy' to the citizen, due process comes into play").

That a civil defendant's reputation stands to be tarnished, often irrevocably, by a punitive award is undeniable. This interest thus demands the high level of care and certainty that our legal tradition has traditionally demanded where punishment is to be inflicted and society's moral opprobrium meted out.²⁸ The first *Eldridge* factor, then, weighs in favor of a burden of proof more exacting than "reasonably satisfied from the evidence" or "preponderance of the evidence."

2. The state's interest in punishing and deterring wrongful behavior—the second factor to be considered under *Eldridge*—cannot be gainsaid. On the other hand, the state's interest in imposing punishment based merely on a "preponderance of the evidence" is slight, at best. Of the forty-five states that permit awards of punitive damages,²⁹ more than half—including now, Alabama

²⁸ It is true, of course, that there are situations in which we tolerate awards with some extra-compensatory character, and do not impose a burden of proof higher than "preponderance of the evidence." For example, treble damages are imposed for antitrust violations. But in antitrust cases, the jury determines compensation. Trebling reflects the decision of the legislature, not the jury. Where strict ceilings on punishment are clearly set by statute, it may well be that the need for an elevated standard of proof is less. But here, where unlimited punishment may be imposed purely as a matter of the decisionmaker's discretion, the need for an elevated standard of proof is clear.

²⁹ Five states have outlawed punitive awards altogether absent explicit statutory authorization. See *Ricard v. State*, 390 So. 2d 882, 884 (La. 1980) (Louisiana); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 47 N.E.2d 265 (1943) (Massachusetts); *Abel v. Conover*, 104 N.W.2d 684 (Neb. 1960) (Nebraska);

itself—already impose a stricter standard of proof without any appreciable effect on their ability to deter or punish wrongful behavior. See *supra* n.24 (enumerating states imposing higher burden). Cf. *Santosky*, 455 U.S. at 767 (observing no perceptible effect of higher standard of proof on efficacy of civil commitment proceedings). Moreover, this Court has observed that “States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.” *Gertz*, 418 U.S. at 349. The added certainty afforded by a higher standard of proof—the assurance that the defendant being punished actually deserves to be punished—neither disparages the state’s interest in punishment nor undermines the state’s ability to punish when punishment is properly due.

While states indisputably have an interest in punishing those who actually engage in reprehensible conduct, they have no interest in blemishing the reputation and character of business entities or individuals which have not engaged in wrongful behavior. Because standards of proof less exacting than “clear and convincing evidence” increase the risk of wrongfully imposing society’s wrath on innocent defendants, “it is at least unclear to what extent, if any, the state’s interests are furthered by using a preponderance standard in such” circumstances. *Addington*, 441 U.S. at 426.

3. Finally, the Court has historically considered the risk of error associated with use of a chosen standard of proof, and whether that risk is constitutionally tolerable in the given context. *Santosky*, 455 U.S. at 761; *Eldridge*, 424 U.S. at 344-45. It has long been recognized that adopting a standard of proof “is more than an empty semantic exercise” (*Addington*, 441 U.S. at 425 (citation omitted)), and indeed reflects ultimate societal

N.H. Rev. Stat. Ann. § 507:16. (Supp. 1988) (New Hampshire); *Kammerer v. Western Gear Corp.*, 618 P.2d 1330, 1337 (Wash. 1980) (Washington).

judgments about competing outcomes. See *Santosky*, 455 U.S. at 766-67; *In re Winship*, 397 U.S. at 363; *Addington*, 441 U.S. at 427.³⁰ Imposition of any standard less exacting than “clear and convincing evidence” embodies at least three societal judgments, none of which accurately reflects society’s purpose in imposing punitive damages.

First, the preponderance standard embodies a notion of equipoise: it suggests that society is content to let the competing litigants “share the risk of error in roughly equal fashion.” *Addington*, 441 U.S. at 423. See also *In re Winship*, 397 U.S. at 371 (Harlan, J., con-

³⁰ In particular, the difference between the preponderance and clear and convincing standards, while “quantitatively imprecise” (*In re Winship*, 397 U.S. at 370 (Harlan, J., concurring)), is nevertheless fundamental. In a nutshell, the preponderance standard merely requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence” *Id.* at 371 (quoting F. James, *Civil Procedure* 250-51 (1965)). Because this standard by its terms measures the quantity, rather than the quality, of the evidence presented, it is more likely to “misdirect the factfinder in the marginal case.” *Santosky*, 455 U.S. at 764. This is because the preponderance standard may lead the jury “merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater *quantum*, without regard to its effect in convincing [the] mind of the truth of the proposition asserted.” *In re Winship*, 397 U.S. at 368 (emphasis added) (citation omitted). See also *Addington*, 441 U.S. at 426 (“the preponderance standard creates the risk of increasing the number of individuals erroneously committed”).

Conversely, the clear and convincing standard by its terms focuses attention on the *quality* of the evidence, requiring in particular “a firm belief or conviction as to the allegations sought to be established.” *Hobson v. Eaton*, 399 F.2d 781, 784 n.2 (6th Cir. 1968) (quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954)). See also E. Cleary, *McCormick on Evidence* § 340, at 959-60 (clear and convincing standard requires that truth of allegation be “highly probable”) (citation omitted). This standard thus mandates a degree of confidence in a chosen outcome greater than the slightly better than average certainty embodied in a preponderance standard.

curing) (use of the preponderance standard suggests that "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor"); *Rivera*, 483 U.S. at 581 (preponderance standard is appropriate in context of paternity suits since each party "has an extremely important, but nevertheless relatively equal, interest in the outcome"). In short, the preponderance standard embodies the belief that, as between two competing parties, each possesses a presumptively equal claim to the money or other interests at stake between them.

Such a presumption has no place in the context of punitive damages. Any award the plaintiff receives in the form of exemplary damages constitutes a "win . . . [t]o recover[y]" over and above the damages required to make him whole. *Foust*, 442 U.S. at 50. See also *Gertz*, 418 U.S. at 349 (characterizing punitive damages as "gratuitous awards" to plaintiffs). Conversely, as discussed above, the prejudice befalling a civil defendant erroneously saddled with a punitive award is grave, and his interest in avoiding such a result is correspondingly strong. It cannot accurately be said, therefore, that each party to a case involving punitive damages "would suffer in a similar way the consequences of an adverse ruling" *Rivera*, 483 U.S. at 581 (endorsing preponderance standard for paternity suits).

Second, by subjecting awards of punitive damages to the same standard as awards of compensation, we imply that both types of awards stand on an equal footing. But we have long accepted the notion that when the state exercises its power to punish, it is engaged in a qualitatively different type of process than when it seeks merely to resolve a private dispute. The gravity of the former inquiry underlies the criminal law's exacting "beyond a reasonable doubt" standard. See *In re Winship*, 397 U.S. at 363 (heightened standard of proof is "a prime instrument for reducing the risk of convictions

resting on factual error"). It is also the reason why, at the very least, the intermediate "clear and convincing evidence" standard is appropriate for "civil cases involving . . . quasi-criminal wrongdoing by the defendant." *Addington*, 441 U.S. at 424 (discussing civil fraud). See also *Simpson v. Pittsburgh Corning Corp.*, No. 89-7742 (2d Cir. April 16, 1990) (same). Conversely, the Court has held that civil commitment proceedings need not be governed by the high criminal law standard precisely because "[i]n a civil commitment state power is not exercised in a punitive sense." *Addington*, 441 U.S. at 428 (emphasis added).

In the context of punitive damages, state power is by definition being exercised "in a punitive sense." *Id.* When a jury administers the "extraordinary sanction" of punitive damages (*Foust*, 442 U.S. at 48), it is plainly making a decision about quasi-criminal wrongdoing. Such a determination is far more consequential, and thus must be based on far greater certainty, than an ordinary civil verdict.

Third, the preponderance standard reflects a willingness in a given setting to tolerate a rate of error only slightly better than equipoise. As applied to punitive damages, such a standard suggests that we, as a people, are satisfied if punishment is inflicted on the basis of no better than fifty-one percent probability. See, e.g., *United States v. Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). Punishment meted out on the basis of marginal determinations of wrongdoing quickly lose their moral force, and come to be regarded as capricious and unjust. Likewise, a would-be deterrent meted out on the basis of caprice ceases to serve as a meaningful deterrent, for it fails to be regarded as providing a clear standard upon which to base one's conduct.

The "logical conclusion of this balancing process" (*Santosky*, 455 U.S. at 768) is that due process requires that

punitive damages awards be supported by at least clear and convincing evidence.³¹ The requirement that punitive damages awards be premised upon a convincing and clear factual foundation will serve both practical and symbolic purposes. See *Addington*, 441 U.S. at 426 ("standards of proof are important for their symbolic meaning as well as for their practical effect").

Where, as in Alabama, the burden for establishing punitive awards has traditionally been the same as for any other civil award, a stricter standard of proof would convey to the judge and jury in dramatic fashion the fundamental difference between an award of compensatory relief and an award of exemplary damages. Raising the burden of proof is "one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate [decisions] will be ordered." *Addington*, 441 U.S. at 427. Simply put, an elevated standard of proof will put juries on notice that in awarding punitive damages they are no longer dealing with a simple question of compensation.³²

³¹ The manifest parallels between a punitive award and a criminal penalty support application to the former of the higher "beyond a reasonable doubt" standard of proof applied in the criminal law. The reasonable doubt standard would afford an appropriately high degree of certainty that punishment is being properly inflicted. See *In re Winship*, 397 U.S. at 364. At a minimum, clear and convincing evidence is constitutionally required. Of course, the Constitution only prescribes "minimum requirements [of due process as] a matter of federal law." *Vitek v. Jones*, 445 U.S. 480, 491 (1980). It in no way pretermits efforts by states to fashion more rigorous procedural safeguards. Thus, the states are always free to subject punitive awards to the reasonable doubt standard, as at least one state has already done. See Colo. Rev. Stat. § 13-25-27(2) (Supp. 1979).

³² As a practical matter, the risk of error and confusion is great where the jury is *simultaneously* asked to address issues of compensation and punishment. It is certainly implicit to the jury that in awarding compensation it is choosing between two equal claimants to the money at stake: The jury is not blind to plain-

Rather, they are meting out punishment, and hence are making peculiarly sacrosanct decisions on behalf of society.

In addition, the clear and convincing standard will better allow judges of both trial and appellate courts to parse those cases which create a jury issue of punitive damages from those which do not. It can provide a court with legitimate tools to determine (rather than simply declare) whether a resulting award is, indeed, based upon and supported by *facts* and *evidence*, rather than the product of passion, prejudice, and the rhetoric of sophisticated advocacy. In short, it provides a necessary means of protecting defendants from the dangers inherent in this unusual civil system of punishment, and ensuring that the system attains some measure of fairness and legitimacy.

CONCLUSION

The availability of judicial review offers no constitutional salvation for standardless punitive damages schemes. An elevated burden of proof, while also not a panacea, is a necessary component of the process constitutionally due civil defendants before they may be subjected to punishment.

Respectfully submitted,

Of Counsel:

HOWARD W. GREENE
Counsel

JAMES T. MCINTYRE

Of Counsel

THE RISK AND INSURANCE
MANAGEMENT SOCIETY

205 E. 42nd Street

New York, New York 10017

(212) 286-9292

VICTOR E. SCHWARTZ

CLIFTON S. ELGARTEN *

LIBERTY MAGARIAN

SCOTT L. WINKELMAN

CROWELL & MORING

1001 Pennsylvania Ave., N.W.

Washington, D.C. 20004-2505

(202) 624-2523

* *Counsel of Record for*

Amici Curiae

June 1, 1990

tiff's need. A stricter standard will communicate to the jury that punishment involves an entirely separate and far graver inquiry, focusing more sharply and narrowly on defendant's culpability.

APPENDIX

APPENDIX

STANDARDS FOR REMITTITUR AND APPELLATE
REVIEW OF JURY AWARDS OF
PUNITIVE DAMAGES IN THE FIFTY STATES

ALABAMA

(a) No presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of the fact.

(b) In all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages. Any relevant evidence, including but not limited to the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether or not the defendant has been guilty of the same or similar acts in the past, the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiffs gave the defendant to remedy the wrong complained of shall be admissible. . . . After such post verdict hearing the trial court shall independently (without any presumption that the award of punitive damages is correct) reassess the nature, extent and economic impact of such an award of punitive damages, and reduce or increase the award if appropriate in light of all the evidence.

Ala. Code § 6-11-23 (1989).

(a) On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded.

(b) The appellate court shall independently reassess the nature, extent and economic impact of such an

award and reduce . . . the award if appropriate in light of all the evidence.

Ala. Code § 6-11-24 (1989).

ALASKA

"A punitive damage award is excessive if it is manifestly unreasonable, resulting from passion or prejudice or disregard of the rules of law. Relevant factors include the compensatory damage amount, magnitude of the offense, importance of the policy violated, and the defendant's wealth."

Alaskan Village, Inc. v. Smolley, 720 P.2d 945, 949 (Alaska 1986) (citations omitted).

ARIZONA

"The appropriate test of passion or prejudice is whether the verdict is 'so manifestly unfair, unreasonable and outrageous as to shock the conscience of the court.' 'The test to be applied . . . is whether the 'verdict is so outrageously excessive as to suggest, at first blush, passion or prejudice.'"

Hawkins v. Allstate Ins. Co., 152 Ariz. 490, 733 P.2d 1073, 1084 (1987) (quoting *Acheson v. Shafter*, 107 Ariz. 576, 579, 490 P.2d 832, 835 (1971) and *Wry v. Dial*, 18 Ariz. App. 503, 515, 503 P.2d 979, 991 (1972)), *cert. denied*, 484 U.S. 874 (1987)).

ARKANSAS

"[T]he standard for determining whether a damage verdict is excessive is 'whether it shocks the conscience of the court or demonstrates that jurors were motivated by passion or prejudice.'"

O'Neal Ford, Inc. v. Davie, 299 Ark. 45, 770 S.W.2d 656, 659 (1989) (quoting *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982)).

Morrison v. Lowe, 274 Ark. 358, 625 S.W.2d 452, 455 (1981).

CALIFORNIA

"[O]ur review of punitive damage awards rendered at the trial level is guided by the 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice. . . . ' . . . [A]n appellate court may reverse such an award 'only "when the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice."'"

Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928-29, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978) (quoting *Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 65, 529 P.2d 608, 624, 118 Cal. Rptr. 184, 200 (1974) and *Schroeder v. Auto Driveaway Co.*, 11 Cal. 3d 908, 919, 523 P.2d 662, 669, 114 Cal. Rptr. 622, 629 (1974)) (footnote and citations omitted).

COLORADO

" '[A]bsent an award so excessive . . . as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.' "

Higgs v. District Ct. In and For Douglas County, 713 P.2d 840, 860-62 (Colo. 1985) (quoting *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 503 (10th Cir. 1984) (quoting *Barnes v. Smith*, 305 F.2d 226, 228 (10th Cir. 1962)) and *Frick v. Abell*, 198 Colo. 508, 512, 602 P.2d 852, 854 (1979)) (citations omitted).

"[T]he court may reduce or disallow the award of exemplary damages to the extent that:

- (a) The deterrent effect of the damages has been accomplished; or
- (b) The conduct which resulted in the award has ceased; or
- (c) The purpose of such damages has otherwise been served.

Colo. Rev. Stat. § 13-21-102(2) (1989).

CONNECTICUT

"Punitive damages . . . are restricted to cost of litigation less taxable costs of the action being tried and not that of any former trial. . . ."

Alaimo v. Royer, 188 Conn. 36, 448 A.2d 207, 209-10 (1982) (quoting *Vandersluis v. Weil*, 176 Conn. 353, 358-59, 407 A.2d 982, 986 (1978)) (citations omitted); *Accord Holbrook v. Casazza*, 204 Conn. 336, 528 A.2d 774, 785 (1987), *cert. denied*, 484 U.S. 1006 (1988).

DELAWARE

"A verdict will not be disturbed as excessive unless it is so clearly so as to indicate that it was the result of passion, prejudice, partiality, or corruption; or that it was manifestly the result of disregard of the evidence or applicable rules of law. A verdict should not be set aside unless it is so grossly excessive as to shock the Court's conscience and sense of justice; and unless the injustice of allowing the verdict to stand is clear."

Cloroben Chem. Corp. v. Comegys, 464 A.2d 887, 892 (Del. 1983) (quoting *Riegel v. Aastad*, 272 A.2d 715, 718 (Del. 1970)).

FLORIDA

(1) (a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty that involves willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant shall not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.

(b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and defendant shall be entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.

Fla. Stat. Ann. § 768.73(1)(a), (b) (West 1989).

(1) In any action to which this part applies wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is excessive . . . in light of the facts and circumstances which were presented to the trier of fact.

....

(5) In determining whether an award is excessive . . . in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range

of damages . . . the court shall consider the following criteria:

- (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;
- (b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amount of damages recoverable;
- (c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;
- (d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and
- (e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

Fla. Stat. Ann. § 768.74(1), (5) (West 1989).

GEORGIA

"Trial courts are authorized to set aside arbitrary verdicts under OCGA § 51-12-12: 'The question of damages is one for the jury; and the court should not interfere with the jury's discretion unless the damages are . . . so excessive as to justify the inference of gross mistake or undue bias,' or, if requested by a proper motion for new trial under OCGA § 5-5-20, ' . . . when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury.' . . . The appellate court

will not disturb the award 'absent an award so excessive . . . as to shock the judicial conscience.'"

Hospital Auth. of Gwinnett County v. Jones, 259 Ga. 759, 386 S.E.2d 120, 125-26 (1989) (quoting *Davis v. Glaze*, 182 Ga. App. 18, 23, 354 S.E.2d 845, 851 (1987)).

HAWAII

"The test on appellate review as to whether the damages awarded by the jury were excessive is whether the award was 'palpably not supported by the evidence, or so excessive and outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against rules of law or suffered their passions or prejudices to mislead them.'"

Kang v. Harrington, 59 Haw. 652, 587 P.2d 285, 292 (1978) (quoting *Vasconcellos v. Juarez*, 37 Haw. 364, 366 (1946)).

IDAHO

"'[O]ur power over excessive damages exists only when the facts are such that the excess appears as a matter of law or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury.'"

Dinneen v. Finch, 100 Idaho 620, 603 P.2d 575, 579 (1979) (quoting *Mendenhall v. MacGregor Triangle Co.*, 83 Idaho 145, 150-51, 358 P.2d 860, 862-63 (1961)); accord *Soria v. Sierra Pac. Airlines, Inc.*, 111 Idaho 594, 726 P.2d 706, 720 (1986).

ILLINOIS

"A reviewing court will not disturb an award of punitive damages on grounds that the amount is ex-

cessive unless it is apparent that the award is the result of passion, partiality, or corruption."

Deal v. Byford, 127 Ill. 2d 192, 130 Ill. Dec. 200, 537 N.E.2d 267, 272 (1989) (citations omitted).

INDIANA

"Damages are not [to be] considered excessive unless at first blush they appear outrageous and excessive or it is apparent that some improper element was taken into account by the jury in determining the amount."

Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845, 849 (1977) (quoting *City of Indianapolis v. Stokes*, 182 Ind. 31, 105 N.E. 477, 479 (1914)).

"We will not reverse an award of damages as being excessive unless the damages appear so unreasonable as to convince us the jury was motivated by passion or prejudice."

Archem, Inc. v. Simo, 549 N.E.2d 1054, 1061 (Ind. App. 1990) (citation omitted).

IOWA

"No remittitur is permitted in this state if punitive damages awarded are found to be excessive."

Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 861 (Iowa 1973).

"However, we may set a punitive damage verdict aside entirely upon proper circumstances."

Team Cent., Inc. v. Teamco, Inc., 271 N.W.2d 914, 926 (Iowa 1978).

KANSAS

"The award of punitive damages will not be set aside unless the trial judge finds that the award (1) was based on passion, prejudice or bias; (2) was based on mistake of law or fact; or (3) lacked evidentiary support."

"Where a verdict is so excessive and out of proportion to the damages sustained as to shock the conscience of the court and judgment has been entered, the trial judge may tentatively affirm the judgment, provided that the plaintiff will accept a reduced judgment, or may grant a new trial"

"[I]f the appellate court determines the trial court did not abuse its discretion in affirming the award of punitive damages, but the award is so excessive and out of proportion as to shock the conscience of the appellate court, the appellate court may tentatively affirm the judgment and allow the plaintiff to either accept a reduced amount or be granted a new trial on the issue of punitive damages. . . ."

Folks v. Kansas Power & Light Co., 243 Kan. 57, 755 P.2d 1319, 1335-36 (1988) (citation omitted).

KENTUCKY

"We have no power to correct the excessive award by remittitur. It is only where the items constituting the damages recovered are separable so that the court may eliminate those not properly recoverable from those which are recoverable that a remittitur may be ordered."

Louisville & N.R. Co. v. Complete Auto Transit, Inc., 259 S.W.2d 483, 484 (Ky. App. 1953) (citations omitted).

"[T]he standard for deciding excessiveness which applies to the trial court's responsibility when called upon to decide whether to grant a new trial on

grounds of excessiveness, which is whether the award appears 'to have been given under the influence of passion or prejudice.' . . . The appellate court will reverse only when it can be said that the trial court has 'clearly erred,' i.e., abused its discretion, in refusing to set aside the award as excessive."

Fowler v. Mantooth, 683 S.W.2d 250, 253 (Ky. 1984). (quoting CR 59.01(d) and *Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984)).

"The test [of excessiveness of an award of punitive damages] for the trial court is often styled 'the first blush rule.'"

First & Farmers Bank of Somerset, Inc. v. Henderson, 763 S.W.2d 137, 142 (Ky. App. 1988) (quoting *Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984)).

LOUISIANA

"It is well settled in our jurisprudence that the trial court is granted much discretion in the awarding of damages, and its determination will not be disturbed absent manifest abuse of that discretion. Before a damage award may be questioned as . . . excessive, the appellate court must look to the individual circumstances of the particular case to determine whether the award was a clear abuse of the trier of fact's great discretion."

Bauer v. White, 532 So. 2d 506, 510 (La. App. 1988) (citing *Reck v. Stevens*, 373 So. 2d 498 (La. 1979)).

MAINE

"The award of punitive damages . . . is within the sound discretion of the fact finder after weighing all relevant aggravating and mitigating factors.'"

Goucher v. Dinneen, 471 A.2d 688, 689 (Me. 1984) (quoting *Hanover Ins. Co. v. Hayward*, 464 A.2d 156, 158 (Me. 1983)).

MARYLAND

"[O]rdinarily[,] excessive damages are not a matter for review by the appellate court."

J.C. Penney Co. v. Harker, 23 Md. App. 121, 326 A.2d 228, 231 (1974).

"The Court of Appeals has frequently reiterated its determined disinclination to review the amount of a jury's award of damages in a tort action. . . . 'We know of no case where this Court has ever disturbed the exercise of the lower court's discretion in denying a motion for new trial because of the . . . excessiveness of damages.'"

Carl M. Freeman Assocs., Inc. v. Murray, 18 Md. App. 419, 306 A.2d 548, 552 (1973) (quoting *Kirkpatrick v. Zimmerman*, 257 Md. 215, 218, 262 A.2d 531, 532 (1970)).

MASSACHUSETTS

"[I]n deciding whether a jury award is excessive . . . the trial judge has his traditional discretion, and his view that the jury verdict should stand would generally be respected by an appellate court, at least where damages were unliquidated.'"

Magaw v. Massachusetts Bay Transp. Auth., 21 Mass. App. 129, 485 N.E.2d 695, 700 (1985) (quoting *Griffin v. General Motors Corp.*, 380 Mass. 362, 371, 403 N.E.2d 402, 408 (1980)).

MICHIGAN

"In reviewing the decision of a trial judge to either grant or deny remittitur or grant a new trial, we

must determine whether there has been an abuse of discretion. A reviewing court will only substitute its judgment for that of the trier of fact where a verdict has been secured by improper methods, prejudice, or sympathy, or where it is so excessive as to 'shock the judicial conscience'."

Green v. Evans, 156 Mich. App. 145, 401 N.W.2d 250, 255 (1985) (citations omitted) (quoting *Gillis v. Board of Tenant Affairs of the Detroit Hous. Comm'n*, 122 Mich. App. 699, 704, 332 N.W.2d 474, 476 (1983)).

MINNESOTA

"The trial court's denial of a remittitur may be reversed only where there has been a clear showing of an abuse of discretion"

"The trial court, having heard the testimony and observed the parties and witnesses, is in a better position than this court to determine whether the damages were given under the influence of passion and prejudice, and in the absence of a clear abuse of that discretion its action will not be reversed."

Robinson v. Mack Trucks, Inc., 426 N.W.2d 220, 226 (Minn. App. 1988).

MISSISSIPPI

"Our general rule is that a damage award is so excessive that it should be altered or amended when it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience. This shock must be experienced by the judicial conscience, not the actual conscience of the members of this Court."

Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 278, (Miss. 1985) (citations omitted), *aff'd*, 486 U.S. 71 (1988).

MISSOURI

Remittitur was abolished in *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. 1985) because it "permits the trial court to find error in its trial and excuse the error upon remittitur of a commanded portion of the jury's verdict, only to see the case appealed despite the remittitur, including a charge of error in the amount of remittitur ordered."

The court's ability to order remittitur in cases involving punitive damages was reinstated by RSMo § 510.263.6 (1988) ("The doctrines of remittitur and additur, based on the trial judge's assessment of the totality of the surrounding circumstances, shall apply to punitive damage awards"). This statute has not yet been interpreted or challenged in a published decision.

MONTANA

(b) When an award of punitive damages is made by the judge, he shall clearly state his reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters:

- (i) the nature and reprehensibility of the defendant's wrongdoing;
- (ii) the extent of the defendant's wrongdoing;
- (iii) the intent of the defendant in committing the wrong;
- (iv) the profitability of the defendant's wrongdoing, if applicable;
- (v) the amount of actual damages awarded by the jury;
- (vi) the defendant's net worth;

(vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;

(viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and

(ix) any other circumstances which may operate to increase or reduce, without wholly defeating, punitive damages.

(c) The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (7) (b). If after review the judge determines that the jury award of punitive damages should be . . . decreased, he may do so. The judge shall clearly state his reasons for . . . decreasing, or not . . . decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (7) (b).

Mont. Code Ann. § 27-1-221(7) (b), (c) (1989).

NEBRASKA

Punitive damages are not allowed. See *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960).

NEVADA

"NRCP 59 includes as grounds for a new trial 'excessive damages appearing to have been given under the influence of passion or prejudice.' . . . [T]he assessing of punitive damages is wholly subjective. There are no objective standards by which the monetary amount can be calculated. The concept of punitive damages rests upon a presumed public policy to punish a wrongdoer for his act and to deter others from acting in similar fashion. The punitive allow-

ance should be in an amount that would promote the public interest without financially annihilating the defendant. The wrongdoer may be punished but not destroyed."

Caple v. Raynel Campers, Inc., 90 Nev. 341, 526 P.2d 334, 336-37 (1974).

NEW HAMPSHIRE

Punitive damages are not allowed. N.H. Rev. Stat. Ann. § 507:16 (1988).

NEW JERSEY

"This Court has held that verdicts should be upset for being excessive only in clear cases, that damage awards will not be set aside unless so excessive as irresistibly to give rise to the inference of mistake, passion, prejudice or partiality, or are so disproportionate as to shock the conscience, or the sustaining of the award would result in a manifest denial of justice."

Leimgruber v. Claridge Assocs., Ltd., 73 N.J. 450, 375 A.2d 652, 657 (1977) (citations omitted).

NEW MEXICO

"[T]he findings of the jury should not be disturbed as excessive, except in extreme cases, as where it results from passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive where palpable error is committed by the jury, or where the jury has mistaken the measure of damages. However, the mere fact that a jury's award is possibly larger than the court would have given is not sufficient to disturb a verdict."

Richardson v. Rutherford, 787 P.2d 414, 422 (N.M. 1990) (quoting *Montgomery v. Vigil*, 65 N.M. 107,

113, 332 P.2d 1023, 1027 (1958) (quoting *Hall v. Stiles*, 57 N.M. 281, 285, 258 P.2d 386, 389 (1953)).

NEW YORK

"[T]he amount of exemplary damages awarded by a jury should not be reduced by a court unless it is so grossly excessive 'as to show by its very exorbitancy that it was actuated by passion'."

Nardelli v. Stamberg, 44 N.Y.2d 500, 377 N.E.2d 975, 977, 406 N.Y.S.2d 443, 445 (1978).

NORTH CAROLINA

"The award of punitive damages is within the discretion of the jury, subject to the limitation that the amount may not be excessively disproportionate to the circumstances."

Raymond U. v. Duke Univ., 91 N.C. App. 171, 371 S.E.2d 701, 709, *rev. denied*, 323 N.C. 629, 374 S.E.2d 590 (1988).

NORTH DAKOTA

"We will not overturn an exemplary damages award as excessive absent passion or prejudice on the part of the jury. Passion means that the jury was motivated by feelings or emotions rather than by the evidence. Prejudice includes forming an opinion without due knowledge or examination."

Olmstead v. First Interstate Bank of Fargo, N.A., 449 N.W.2d 804, 809 (N.D. 1989) (citations omitted).

OHIO

"[G]enerally, the amount of punitive damages to be awarded rests largely within the determination of the trier of fact. Furthermore, the trial judge is in

the best position to determine whether an award is so excessive as to be deemed the product of passion or prejudice, or to require remittitur. . . . [A]n '[a]ppellate court hesitates to enter *remittitur* or set aside [a] jury's verdict, supported by creditable proof, as excessive, in [the] absence of passion or prejudice evidenced by [the] record.'"

Villella v. Waiken Motors, Inc., 45 Ohio St. 3d 36, 543 N.E.2d 464, 469 (1989) (emphasis in original; citations omitted).

OKLAHOMA

"A punitive damages verdict lies peculiarly within the province of the jury and it will not be casually interfered with on appeal when it is claimed to have been actuated by passion or prejudice. Unless the verdict appears to be grossly excessive or the result of the jury's passion, prejudice or improper sympathy, it will not be conditioned by a remittitur. But where an award is found so out of proportion as to be unconscionable, a conditional affirmance, subject to remittitur, may be required."

Chandler v. Denton, 741 P.2d 855, 868 (Okla. 1987) (footnotes omitted).

OREGON

"Remittitur, in consequence of Oregon Constitution Art. VII, § 3, is not available in this state."

State ex rel. Young v. Crookham, 290 Or. 61, 618 P.2d 1268, 1272 (1980) (citing *Van Lom v. Schneiderman*, 187 Or. 89, 110-13, 210 P.2d 461, 471 (1949)).

PENNSYLVANIA

"[A]t some point the amount of punitive damages may be so disproportionate when compared to the character of the act, the nature and extent of the harm and the wealth of the defendant, that it will shock the court's sense of justice. In those rare instances, the court is given discretion to remit the damages to a more reasonable amount."

Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 555, A.2d 800, 803-04 (1989).

RHODE ISLAND

"A jury award of punitive damages may be set aside by the trial court if the amount 'clearly appears to be excessive, or to represent biased judgment.'"

Zarrella v. Robinson, 460 A.2d 415, 418-19 (R.I. 1983).

SOUTH CAROLINA

"It is not necessary in reducing an excessive verdict by granting a new trial nisi that the judge find it to be so excessive as to indicate it was the result of prejudice, caprice, passion, or other consideration not founded on the evidence; it is enough if the judge deems the verdict to indicate undue liberality on the part of the jury."

Johnston v. Brown, 290 S.C. 141, 348 S.E.2d 391, 394 (S.C. App. 1986), *rev'd on other grounds*, 292 S.C. 478, 357 S.E.2d 450 (1987).

SOUTH DAKOTA

"There is no precise mathematical ratio between compensatory and punitive damages. Punitive damages must not be so oppressive or so large as to shock the sense of fair-minded men, but they may considerably

exceed compensatory damages. To accomplish the objective of punishing the wrongdoer and deterring others from similar wrongdoing, punitive damages must be relatively large. The amount allowed in compensatory damages is but one of the circumstances to consider regarding the proper amount of punitive damages. Other factors that properly have a bearing upon the amount of punitive damages are the nature and enormity of the wrong, the intent of the wrongdoer, his financial condition, and all of the circumstances attendant to his actions."

Hulstein v. Meilman Food Indus., Inc., 293 N.W.2d 889, 892 (S.D. 1980) (citations omitted).

TENNESSEE

"Admittedly, it is difficult to lay down a rule for testing the excessiveness of a verdict for punitive damages; however, such an award will be set aside if it is grossly excessive or appears to be the result of passion, prejudice, improper sympathy, or for some other reason appears to constitute an injustice. The factors to be considered in assessing the award include the nature of the defendant's acts, the amount of compensatory damages awarded and the wealth of the particular defendant."

Coppinger Color Lab, Inc. v. Nixon, 698 S.W.2d 72, 75 (Tenn. 1985) (citations omitted).

TEXAS

"Although the verdict is large and the trial court, in the exercise of its sound discretion, could have set it aside, an appellate court will not disturb the verdict in the absence of circumstances tending to show that it was the result of passion, prejudice, or other improper motive; or that the amount fixed was not the result of a deliberate and conscientious conviction in the minds of the jury and the court; or that the

amount was so excessive as to shock a sense of justice of the appellate court."

Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 864 (Tex. App. 1987).

UTAH

"Generally, the only limitation on this discretion [of the jury to award punitive damages] is that the award must not be the result of passion and prejudice. The measure of the verdict might be so grossly excessive and disproportionate to the injury that this court would say, from that fact alone, that as a matter of law the verdict must have been arrived at by passion or prejudice. However, to support that conclusion, the verdict must be so excessive as to be shocking to one's conscience and to clearly indicate passion, prejudice or corruption on the part of the jury."

Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314, 328-29, (Utah 1979) (footnote omitted), *rev'd on other grounds*, *McFarland v. Skaggs Cos., Inc.*, 678 P.2d 298 (Utah 1984).

VERMONT

"Essentially, remittitur is evaluated by whether or not the damages were 'manifestly and grossly excessive.' Unless grossly excessive, this Court will not interfere with an award of damages where exact computation is impossible."

Lent v. Huntoon, 143 Vt. 539, 470 A.2d 1162, 1172 (1983) (citations omitted).

VIRGINIA

"[N]o fixed standard exists for the calculation of punitive damages and . . . it is an issue largely within the discretion of the jury. Nevertheless, the

'amount of punitive damages awarded should bear some reasonable relationship to the actual damages sustained and to the measure of punishment required. . . .'

Philip Morris Inc. v. Emerson, 235 Va. 380, 368 S.E.2d 268, 286-87 (1988) (citation omitted) (quoting *Gazette, Inc. v. Harris*, 229 Va. 1, 51, 325 S.E.2d 713, 747, *cert. denied*, 472 U.S. 1032 (1985), and 473 U.S. 905 (1985)).

WASHINGTON

Punitive damages are not allowed. *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 P. 1072 (1891).

WEST VIRGINIA

"Only where the award of punitive damages has no foundation in the evidence so as to evince passion, prejudice or corruption in the jury should the award be set aside as excessive."

Wells v. Smith, 297 S.E.2d 872, 880 (W. Va. 1982).

In *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 800 (W. Va. 1986), the West Virginia Supreme Court of Appeals abandoned the rule that remittitur of indeterminate damages is impermissible, and established the following standard for deciding the amount of damages to be remitted:

"What is the highest jury award under the facts of this case that would not be monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption?"

WISCONSIN

"We hold that the Powers Rule extends to punitive damages and a trial court has the power to reduce

the amount of punitive damages to which it determines is a fair and reasonable amount for such kind of damages."

Malco, Inc. v. Midwest Aluminum Sales, Inc., 14 Wis. 2d 57, 109 N.W.2d 516, 521 (1961) (citing *Powers v. Allstate Ins. Co.*, 10 Wis. 2d 78, 102 N.W.2d 393 (1960)).

WYOMING

"Consistently with the purposes of punishment and deterrence this court has identified the factors justifying an award of punitive damages as: '(a) the financial condition or wealth of the defendant; (b) the activity of the defendant causing the harm; and (c) the nature and extent of the injury suffered.'"

Adel v. Parkhurst, 681 P.2d 886, 891 (Wyo. 1984) (quoting *Cates v. Eddy*, 669 P.2d 912, 921 (Wyo. 1983)).

AMICUS CURIAE

BRIEF

28
No. 89-1279

Supreme Court, U.S.
FILED

JUN 1 1990

JOSEPH F. SPANGL, JR.
CLERK

**IN THE
Supreme Court of the United States
OCTOBER TERM, 1989**

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

**CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,**
Respondents.

**On Writ of Certiorari to
the Supreme Court of Alabama**

**BRIEF OF THE WASHINGTON LEGAL
FOUNDATION; U.S. REPRESENTATIVES JOE
BARTON, DAN BURTON, HAMILTON FISH, JR.,
PAUL B. HENRY, HENRY J. HYDE, AND THOMAS
E. PETRI; AND THE ALLIED EDUCATIONAL
FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER**

**DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
Washington Legal Foundation
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240**

June 1, 1990

QUESTION PRESENTED

Amici will address the following issue:

Whether Alabama law, as applied below, violates Pacific Mutual's right to Due Process under the Fourteenth Amendment by allowing the jury to award punitive damages against Pacific Mutual in the absence of any advance notice to Pacific Mutual as to the potential size of a punitive damage award.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	
I. THE PUNITIVE DAMAGE AWARD IN THIS CASE VIOLATED PACIFIC MUTUAL'S DUE PROCESS RIGHTS IN THE ABSENCE OF ANY ADVANCE NOTICE TO PACIFIC MUTUAL AS TO THE POTENTIAL SIZE OF A PUNITIVE DAMAGE AWARD	6
II. THE VOID-FOR-VAGUENESS DOCTRINE IS FULLY APPLICABLE TO CIVIL CASES	11
III. PROVIDING NOTICE OF POTENTIAL PENALTIES IS JUST AS IMPORTANT AS PROVIDING NOTICE OF PROHIBITED CONDUCT	15
IV. PUNITIVE DAMAGE AWARDS IMPLICATE DUE PROCESS CONCERNS REGARDLESS WHETHER, AS HERE, THE PARTY RECEIVING THE AWARD IS A PRIVATE PARTY	18
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Bankers Life and Casualty Co. v. Crenshaw</i> , 108 S.Ct. 1645 (1988)	9, 15
<i>Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.</i> , 109 S.Ct. 2909 (1989)	14
<i>Calder v. Bull</i> , 3 U.S.(3 Dall.) 386 (1798)	18
<i>Campbell v. Burns</i> , 512 So.2d 1341 (Ala. 1987)	9
<i>Cummings v. Missouri</i> , 71 U.S. (4 Wall.) 277 (1867)	18
<i>Dobbert v. Florida</i> , 432 U.S. 282 (1977)	18
<i>Eichenseer v. Reserve Life Ins. Co.</i> , 894 F.2d 1414 (5th Cir. 1990)	10
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978)	6
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972)	19
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	8, 14, 18

<i>Giaccio v. State of Pennsylvania</i> , 382 U.S. 399 (1966)	11, 18
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	6, 7
<i>H.J., Inc. v. Northwestern Bell Telephone Co.</i> , 109 S.Ct. 2893 (1989)	2
<i>International Brotherhood of Electrical Workers v. Foust</i> , 442 U.S. 42 (1979)	8, 9
<i>Jordan v. DeGeorge</i> , 341 U.S. 223 (1951)	12, 18
<i>Kansas and Missouri v. Utilicorp United Inc.</i> , No. 88-2109 (decision pending 1990)	2
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)	11
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	6, 19
<i>Mitchell v. W.T. Grant Co.</i> , 416 U.S. 600 (1974)	19
<i>North Georgia Finishing, Inc. v. DiChem</i> , 419 U.S. 601 (1975)	19
<i>Pacific Gas & Electric Co. v. Public Utilities Commission of California</i> , 475 U.S. 1 (1986)	2
<i>Pacific Mutual Life Ins. Co. v. Haslip</i> , 553 So.2d 537 (Ala. 1989)	4

<i>Rooney v. North Dakota</i> , 196 U.S. 319 (1905)	17
<i>Shiloh Construction Co. v. Mercury Construction Corp.</i> , 392 So.2d 809 (Ala. 1980)	10
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974)	11
<i>Sniadich v. Family Financial Corp.</i> , 395 U.S. 337 (1969)	19
<i>Tull v. United States</i> , 481 U.S. 412 (1987)	2, 14
<i>United States v. Batchelder</i> , 442 U.S. 1145 (1979)	15
<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982)	11, 12, 13, 14, 19
<i>Weaver v. Graham</i> , 450 U.S. 24 (1981)	18
<i>Zauderer v. Office of Disciplinary Counsel</i> , 471 U.S. 626 (1985)	13
CONSTITUTIONAL PROVISIONS:	
U.S. Const. art. I, § 9, cl. 3	17
U.S. Const. art. I, § 10, cl. 1	17
U.S. Const. amend. XIV	6

MISCELLANEOUS:

Aristotle, *Nichomachean Ethics*,
bk. X, ch. 9 16

Wheeler, "The Constitutional Case For
Reforming Punitive Damages Procedures,"
69 U.Va.L.Rev. 269 (1983) 14, 19

Note, "RICO's 'Pattern' Requirement: Void
for Vagueness?," 90 Colum.L.Rev. 489,
512-14 (1990) 7

Note, "Can Punitive Damages Standards Be
Void for Vagueness?," 63 St. John's L.Rev.
52, 59 (1988) 11

Petition for Writ of Certiorari, *Pacific
Mutual Life Ins. Co. v. Cleopatra Haslip,
Cynthia Craig, Alma M. Calhoun, and Eddie
Hargrove*, No. 89-1279 16

Reply Brief in Support of Petition for
Certiorari, *Pacific Mutual Life Ins. Co.
v. Cleopatra Haslip, Cynthia Craig,
Alma M. Calhoun, and Eddie Hargrove*,
No. 89-1279 10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,

Respondents.

BRIEF OF THE WASHINGTON LEGAL
FOUNDATION; U.S. REPRESENTATIVES
JOE BARTON, DAN BURTON, HAMILTON
FISH, JR., PAUL B. HENRY, HENRY J. HYDE,
AND THOMAS E. PETRI; AND THE
ALLIED EDUCATIONAL FOUNDATION AS
AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of time to advancing the interests of the free enterprise system, and the economic and civil

liberties of individuals and businesses. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases affecting business. See, e.g., *Kansas and Missouri v. Utilicorp United Inc.*, No. 88-2109 (decision pending 1990); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989); *Tull v. United States*, 481 U.S. 412 (1987); and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

Reps. Joe Barton (Tex.), Dan Burton (Ind.), Hamilton Fish, Jr. (N.Y.), Paul B. Henry (Mich.), Henry J. Hyde (Ill.), and Thomas E. Petri (Wisc.) are Members of the United States House of Representatives. Each is vitally concerned that the nation's court systems fully respect the constitutional rights of all litigants. Their constituents, as consumers, must ultimately bear the large costs associated with the award of punitive damages in tort suits. Congress has been considering the adoption of reforms in the tort system, and the outcome of this lawsuit may well have an impact on the course of such reforms.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus* before this Court on several occasions in cases involving individual rights.

Each of the *amici* is affected by the increasing number of truly staggering punitive damage awards that have been imposed against civil litigants in recent years. The most frequent target of such awards are businesses. While the direct payors of such awards are the individual litigants themselves, the consuming public ultimately

pays for such awards in the form of higher prices and the absence of products forced off the U.S. market for fear of unpredictable liability.

Amici believe that the best interests of the consuming public will be served if the Court imposes some constitutional limitations on the award of punitive damages by state and federal courts. *Amici* are filing this brief because of their interest in promoting the welfare of the consuming public; they have no direct economic interest in the outcome of this lawsuit or of other lawsuits raising similar constitutional issues. Because of their lack of direct economic interests, *amici* believe that they can assist the Court by providing a perspective that is distinct from that of either party.

Amici submit this brief on behalf of Petitioner with the written consent of both parties.

STATEMENT OF THE CASE

Amici are, in the interest of brevity, omitting any detailed statement of the facts of this case. *Amici* adopt by reference the statement of facts contained in Petitioner's brief.

In brief, the Alabama courts in this case granted Respondents a \$1,078,000 punitive damage award against Petitioner Pacific Mutual Life Insurance Co. ("Pacific Mutual") based on the conduct of one of Pacific Mutual's agents. The agent, unbeknownst to senior officials at Pacific Mutual, had collected health insurance premiums from Respondents on behalf of another, wholly unrelated, insurance company (Union Fidelity Life Insurance Co.) and then, instead of obtaining insurance coverage for Respondents through Union Fidelity, had simply pocketed the premiums.

Respondents discovered the agent's fraud after one of the Respondents, Cleopatra Haslip, was hospitalized and incurred \$3,800 in medical expenses. Union Fidelity denied coverage for those expenses on the ground that no health insurance policy was in force. Those expenses, together with the trauma suffered by Ms. Haslip as a result of being faced with large, uninsured medical bills, were the only actual damages suffered by any of the Respondents in this case; all health insurance premiums paid by Respondents were refunded in full.

At trial, the jury was instructed that if it found the agent guilty of fraud and if it found Pacific Mutual responsible for the agent's conduct, it was free to award punitive damages against Pacific Mutual "in your discretion." The only guidance given to the jury as to the amount of punitive damages to be awarded was, "[Y]ou must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs." The jury then returned a punitive damage award against Pacific Mutual that was more than 283 times greater than Ms. Haslip's medical expenses. The jury award was twice as large as any punitive damages award that had ever been upheld in the history of the Alabama court system as of 1981, when the events relevant to this case took place.

The trial court and the Alabama Supreme Court (with two justices dissenting) upheld the jury's punitive damage award. *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala. 1989).

SUMMARY OF ARGUMENT

Alabama punitive damages law is overly vague; people of ordinary intelligence simply are unable to determine their potential liability for punitive damage awards and to fashion their conduct accordingly. The imposition of punitive damages on Pacific Mutual on the basis of Alabama's overly vague laws is a violation of Pacific Mutual's rights under the Due Process Clause.

The doctrine prohibiting the deprivation of liberty or property on the basis of overly vague laws -- known as the "void-for-vagueness" doctrine -- had its genesis in criminal cases. However, recent case law makes clear that the doctrine is equally applicable to civil cases, such as this case. Moreover, the doctrine is applicable not only to claims that the prohibited *conduct* is not clearly defined but also to claims, as here, that the potential *penalty* is overly vague. The argument that the doctrine can be invoked to void laws with overly vague penalty provisions is supported by analogy to the Ex Post Facto Clauses of the U.S. Constitution.

Finally, the void-for-vagueness doctrine is fully applicable even when it is not the government that seeks a judgment against the defendant but rather, as here, it is a private individual that seeks a judgment.

ARGUMENT

I. THE PUNITIVE DAMAGE AWARD IN THIS CASE VIOLATED PACIFIC MUTUAL'S DUE PROCESS RIGHTS IN THE ABSENCE OF ANY ADVANCE NOTICE TO PACIFIC MUTUAL AS TO THE POTENTIAL SIZE OF A PUNITIVE DAMAGE AWARD

Before the courts of Alabama may issue a judgment depriving Pacific Mutual of property, they must afford Pacific Mutual all protections it is entitled to under the Due Process Clause of the Fourteenth Amendment.¹ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Chief among those protections is the right not to be deprived of property on the basis of any overly vague law. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). As the Court explained in *Grayned*:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be pre-

¹ The Due Process Clause of the Fourteenth Amendment provides:

[N]or shall any state deprive any person of life, liberty or property without due process of law.

A corporation is considered a "person" within the meaning of the Fourteenth Amendment. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n.15 (1978).

vented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09. See also Note, "RICO's 'Pattern' Requirement: Void for Vagueness?," 90 Colum. L. Rev. 489, 512-14 (1990).

Amici believe that Alabama's system for the imposition of punitive damages in civil cases offends both of the important values cited above. By permitting juries to deprive defendants of their property through the imposition of punitive damages without simultaneously providing juries with adequate standards with which to determine whether to award punitive damages and, if so, in what amount, Alabama runs afoul of the void-for-vagueness doctrine, as enunciated by *Grayned*.

Amici understand that other briefs to be filed in support of Pacific Mutual will press the argument that Alabama punitive damages law offends the second of the two values cited in *Grayned*: that the law creates unacceptable dangers of arbitrary and discriminatory enforcement by impermissibly delegating basic policy matters to juries. Accordingly, *amici* have focused their brief on the argument that Alabama punitive damages law offends the first of the two values cited in *Grayned*: that the law deprived Pacific Mutual of fair notice that it might be held liable for the punitive

damages imposed upon it in this case.²

This Court has repeatedly recognized that an award of punitive damages is an "extraordinary sanction." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). Punitive damages do not represent compensation for any injury suffered by the plaintiff in a civil suit; rather, they "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

The average person is aware that tort law requires him to pay all *actual* damages caused by his wrongful conduct. Given the reasonable foreseeability of most injuries suffered by others as a result of one's wrongful conduct, due process is not offended by a judgment requiring a defendant to compensate a plaintiff for all such injuries. Such a defendant has fair notice, before committing his wrongful act, of the potential magnitude of his liability. However, because punitive damage awards need not bear any relation to the amount of damages actually suffered, a defendant has no similar advance notice regarding the potential size of his punitive damages liability. As Justice O'Connor has explained, "Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, the impact of these windfall recoveries is unpredictable and potentially

² *Amici* believe that Alabama law failed even to place Pacific Mutual on notice that it was liable for any award of punitive damages. However, *amici* have focused this brief on a more narrow point: that even if Alabama law placed Pacific Mutual on notice that it might be held liable for some amount of punitive damages (based on a theory of vicarious liability for the unauthorized conduct of its agent), Pacific Mutual lacked any notice regarding the potentially vast size of a punitive damage award.

substantial.'" *Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1655 (1988)(O'Connor, J., concurring in judgment)(quoting *Electrical Workers v. Foust*, 442 U.S. at 50).

A state is free to cure that absence of notice by, for example, adopting laws that specify a range of potential punitive damage awards for specific types of wrongful conduct. However, Alabama has taken no such steps. Rather, it has delegated to juries unbridled discretion to determine the size of punitive damage awards as they see fit.³ In the absence of any advance notice to Pacific Mutual that it could be held liable for more than \$1 million in punitive damages based on its conduct in this case, the judgment entered by the Alabama courts is in violation of Pacific Mutual's due process rights and must be vacated.

It will not do for Respondents to argue that since Pacific Mutual was aware that Alabama juries are empowered to award punitive damages as they see fit, Pacific Mutual had notice of the possibility of a million-dollar verdict. Notice that one's conduct might subject one to punitive damages liability of anywhere from \$1 to \$10 million is no notice at all; the "person of ordinary intelligence" referred to in *Grayned* will be unable to use that notice as a guide to the conduct of his affairs. Nor is Alabama law saved because it is

³ While Alabama jury verdicts awarding punitive damages are subject to post-trial review by the trial court and appellate courts, that review generally accords great deference to the jury's award and thus does little to control a jury's unbridled discretion to award punitive damages. See, e.g., *Campbell v. Burns*, 512 So.2d 1341, 1343 (Ala. 1987). Accordingly, Alabama appellate decisions provide virtually no notice as to the potential size of punitive damage awards.

judge-made rather than statutorily based. As Judge Jones of the Fifth Circuit has noted:

[I]f a statute declared as an offense the refusal to pay an insurance claim without an arguable or reasonable basis, which refusal was attended by gross negligence or recklessness, and if the statute then punished this offense with fines ranging from zero to millions of dollars at the sole discretion of the factfinder, I think we would not hesitate to strike it down for vagueness.

Eichenseer v. Reserve Life Ins. Co., 894 F.2d 1414, 1421-22 (5th Cir. 1990)(Jones, J., dissenting from denial of rehearing en banc).

Moreover, even if it could be argued that companies doing business in Alabama today have notice of their potential liability for multi-million-dollar punitive damage awards, Pacific Mutual clearly had no such notice in the summer of 1981 -- when the events at issue in this lawsuit transpired. The largest punitive damages award ever affirmed by the Alabama Supreme Court up until that date was in the amount of \$560,000. See *Shiloh Construction Co. v. Mercury Construction Corp.*, 392 So.2d 809 (Ala. 1980).⁴ Accordingly, Pacific Mutual could not have had notice in 1981 that its conduct was opening itself up for a punitive damage award nearly twice as large as any award ever affirmed to that date.

⁴ A table listing all Alabama Supreme Court cases involving an award of punitive damages (and indicating the court's disposition of each case) is attached as Appendix E to Pacific Mutual's reply brief in support of its petition for a writ of certiorari.

In the absence of some advance warning to Pacific Mutual -- either in the form of a statute or in the form of a judicially crafted rule -- that its conduct toward Respondents would subject it to a punitive damage award in the range of the award actually rendered, the judgment in this case cannot pass muster under the Due Process Clause.

II. THE VOID-FOR-VAGUENESS DOCTRINE IS FULLY APPLICABLE TO CIVIL CASES

Many of the cases in which this Court has considered the void-for-vagueness doctrine have involved the application of criminal statutes, and language in some of those cases suggests that the doctrine applies with special force in the criminal context. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *Smith v. Goguen*, 415 U.S. 566, 573 n.10 (1974).

Nonetheless, one need not argue that a punitive damage award is a quasi-criminal penalty in order to invoke the protection of the void-for-vagueness doctrine against such awards. The Court has made clear that while greater deference will be granted to civil laws than to criminal laws when applying the void-for-vagueness doctrine, the doctrine is fully applicable in the civil context. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); Note, "Can Punitive Damages Standards Be Void for Vagueness?," 63 St. John's L. Rev. 52, 59 (1988). Thus, in *Giaccio v. State of Pennsylvania*, 382 U.S. 399 (1966), the Court struck down on vagueness grounds a Pennsylvania statute that authorized a jury, at its discretion and unguided by any clear standards, to impose the costs of a criminal prosecution on an acquitted defendant. The Court stated that whether the

statute should be classified as civil or criminal was irrelevant to the vagueness analysis:

Whatever label has been given to the [Pennsylvania statute], there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and his property. . . . Implicit in this constitutional safeguard [the Due Process Clause] is the premise that the law must be one that carries an understandable meaning with legal standards that courts must accept.

Id. at 402, 403. Similarly, in *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951), the Court applied a void-for-vagueness test to a civil statute involving deportation proceedings.

In *Hoffman Estates*, the Court discussed several factors that should be considered in determining how strictly the void-for-vagueness doctrine should be applied to a given statute. Among those factors were:

- (1) Economic regulation is subject to a less strict vagueness test, particularly where the subject matter of the regulation is narrow, or where the regulated businesses have the opportunity to seek clarification of potentially vague regulations;
- (2) Laws with civil rather than criminal penalties are subject to a less strict vagueness test because the consequences of imprecision are less severe;
- (3) Laws containing a scienter requirement are subject to a less strict vagueness test,

especially with respect to the adequacy of notice that one's conduct is proscribed; and

- (4) Laws that threaten to inhibit the exercise of constitutionally protected rights are subject to a more stringent vagueness test.

Hoffman Estates, 455 U.S. at 498-99.

Applying the factors enunciated in *Hoffman Estates* to this case, one could conclude that Alabama's punitive damages laws should be tested under a moderately relaxed void-for-vagueness standard. First, those laws do not appear to be the type of "economic regulation" that the Court had in mind in *Hoffman* as meriting relaxed review; although Alabama's punitive damages laws are being applied to a business enterprise in this instance, the laws are of general applicability to all citizens and are not confined to a "narrow" subject matter. Moreover, Alabama has no mechanism whereby companies such as Pacific Mutual can seek guidance from the state government regarding their potential liability for punitive damages. Cf. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 668 (1985) (Brennan, J., concurring in part and dissenting in part) (there is little rationale for permitting punishment for violation of imprecise commercial regulations unless "a businessperson can clarify the meaning of an arguably vague regulation by consulting with the government administrators").

The second *Hoffman* factor -- whether the law challenged on vagueness grounds is civil or criminal -- would suggest that a somewhat relaxed vagueness test ought to be applied to the not-strictly-criminal state laws at issue in this case. However, the quasi-criminal nature of a large punitive damage award should not be

overlooked. As Justice O'Connor has noted, "The Court's cases abound with the recognition of the penal nature of punitive damages. See *Tull v. United States*, 481 U.S. 412, 422, and n.7 (1987)." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2932 (1989)(O'Connor, J., dissenting). The criminal/civil distinction becomes especially blurred when, as here, the entity being sanctioned is a corporation. A corporation cannot be incarcerated; thus, the sole criminal sanction that Alabama can impose on a foreign corporation is a monetary fine -- precisely the sanction imposed on Pacific Mutual here, but in an amount greater than the fine provided for under any Alabama criminal statute. Moreover, the stigmatizing effect to a corporation of a large punitive damages award may well prove to be as great as the stigmatizing effect of a criminal conviction. See Wheeler, "The Constitutional Case for Reforming Punitive Damages Procedures," 69 U. Va. L. Rev. 269, 280-83 (1983).

The third *Hoffman* factor -- whether the challenged law includes a scienter requirement -- militates in favor of application of a stricter vagueness test in this case. Alabama imposed punitive damages on Pacific Mutual without requiring a showing of scienter; rather, Pacific Mutual was held vicariously liable for the conduct of a non-managerial agent.⁵

⁵ The fourth *Hoffman* factor -- threats to constitutionally protected rights -- does not appear to be a major factor in this case. The decision in this case is unlikely to inhibit the exercise of such rights by Pacific Mutual. Nonetheless, the broad discretion granted to Alabama juries to impose punitive damages could cause others to refrain from exercising such rights. For example, newspapers have much to fear from libel suits brought under Alabama's liberal punitive damages provisions, notwithstanding the broad protection afforded newspapers by *Gertz*.

Regardless of the level of strictness with which the Court applies the void-for-vagueness test in this case, the scheme under which Alabama permits the imposition of punitive damages cannot meet that test. Alabama is required under the Due Process Clause to provide some guidance to potential defendants regarding the size of punitive damage liability that may arise from a given course of conduct. Application of a less strict vagueness test in this case would permit Alabama to provide that guidance with less clarity (e.g., to specify that punitive damage awards would fall somewhere within a relatively broad range). However, there is no constitutional sanction for what Alabama has done in this case: impose a huge punitive damage award against Pacific Mutual without any advance notice.

III. PROVIDING NOTICE OF POTENTIAL PENALTIES IS JUST AS IMPORTANT AS PROVIDING NOTICE OF PROHIBITED CONDUCT

In addressing the requirement that defendants be given fair warning, the great majority of this Court's void-for-vagueness decisions have focused on the need to provide defendants with a reasonable opportunity to discern what conduct is prohibited. Nonetheless, the Court's case law is clear that the Due Process Clause also requires that advance notice be provided regarding potential penalties. Thus, in *United States v. Batchelder*, 442 U.S. 114, 122 (1979), the Court stated, "So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." See also *Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. at 1656 (O'Connor, J., concurring in judgment) ("[t]his grant of wholly standardless discretion to

determine the severity of punishment appears inconsistent with due process").

Fair warning of the consequences of engaging in prohibited conduct is particularly important when, as here, the defendant is a corporation being held vicariously liable for the acts of others. It could be argued plausibly that an individual defendant has no cause for complaint concerning his punishment if he knowingly engages in prohibited conduct, even if he had no advance warning of the potential consequences of his conduct; one could argue that such an individual could have avoided those consequences by adhering to known rules of conduct.⁶ That argument has no force, however, when the defendant is a corporation facing vicarious liability for the acts of others. Such a defendant cannot be said to have knowingly engaged in prohibited conduct. The worst that can be said about such a corporation is that it failed to take sufficient steps to prevent wrongdoing by others.⁷ But the affirmative steps that a corporation will take to prevent wrongdoing by others will necessarily depend in large measure on the potential consequences to the corporation of others' wrongdoing. Had Pacific Mutual known that it would be subject to million-dollar-plus punitive damage verdicts for any wrongful acts of its agents, one can rest assured that Pacific Mutual would have done

⁶ That argument, however, appears to ignore basic human nature. To quote Aristotle: "The generality of men are naturally apt to be swayed by fear rather than by reverence, and to refrain from evil rather because of the punishment that it brings than because of its own foulness." Aristotle, *Nicomachean Ethics* bk. X, ch. 9 at 1.

⁷ For example, in this case, the Alabama Supreme Court faulted Pacific Mutual for not taking steps to rein in its agent upon first learning of complaints being filed against him. See Petition for Writ of Certiorari at A14-15.

all it could to prevent such acts.⁸ Accordingly, there is a fundamental unfairness in permitting Alabama to sandbag Pacific Mutual by failing to disclose in advance the dire consequences that could befall Pacific Mutual for the misconduct of others.

This Court's consistent interpretation of the Ex Post Facto Clauses of the Constitution⁹ strongly supports the argument that the vagueness doctrine requires fair warning of penalties as well as prohibited acts. The Court's first discussion of the *ex post facto* prohibition in 1798 made clear that the prohibition extended to after-the-fact changes in criminal penalties. The Court discerned four types of laws prohibited by the clauses:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.* 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.

⁸ For example, at a cost far less than the judgment entered in this case, Pacific Mutual could have hired an additional team of internal investigators whose full-time job it would have been to root out fraudulent activity by agents. But such measures would make economic sense only *after* a corporation has been given fair warning that it will be subject to million-dollar-plus punitive damage awards if such activity persists.

⁹ U.S. Const. art. I, § 9, cl. 3; art. I, § 10, cl. 1.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798)(emphasis added). The Court repeatedly reaffirmed that broad reading of the *ex post facto* prohibition in the succeeding 200 years. See, e.g., *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867); *Rooney v. North Dakota*, 196 U.S. 319 (1905); *Dobbert v. Florida*, 432 U.S. 282 (1977); *Weaver v. Graham*, 450 U.S. 24 (1981).

The rationale underlying the Court's broad reading of the *ex post facto* prohibition is identical to one of the rationales underlying the void-for-vagueness doctrine: that citizens be given fair warning both of prohibited conduct and of the consequences of engaging in such conduct. *Id.* at 29-30 ("[t]hrough [the *ex post facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed"). The Ex Post Facto Clauses have direct application only to explicitly criminal statutes and thus appear not to be applicable in this case. Nonetheless, given the similarity between the rationale underlying those clauses and the rationale underlying the void-for-vagueness doctrine, the Court's consistent interpretation of those clauses as applying to punishment as well as to conduct lends strong support to a similar interpretation of the void-for-vagueness doctrine.

IV. PUNITIVE DAMAGE AWARDS IMPLICATE DUE PROCESS CONCERNS REGARDLESS WHETHER, AS HERE, THE PARTY RECEIVING THE AWARD IS A PRIVATE PARTY

Several of the cases in which this Court has applied the void-for-vagueness test in non-criminal matters were cases in which the plaintiff was a governmental entity.

See, e.g., *Hoffman Estates*, 455 U.S. 489 (1982); *Giaccio*, 382 U.S. 399 (1966); *Jordan v. DeGeorge*, 341 U.S. 223 (1951). However, in none of those cases did the Court indicate that the governmental status of the plaintiff had any bearing on the applicability of due process concerns to the statute at issue. To the contrary, this Court's case law makes clear that due process concerns are implicated whenever a state's judicial powers are invoked, regardless of the plaintiff's identity. *Logan v. Zimmerman Brush Co.*, 455 U.S. at 429. Thus, in *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349-50, the Court held that a libel suit brought by a private party involved sufficient state action that the defendant was entitled to invoke First Amendment protections against efforts by the plaintiff to recover punitive damages.

The Court has repeatedly held that state action is present -- and thus that due process concerns are implicated -- whenever the state courts use their enforcement powers to transfer property from one person to another. *North Georgia Finishing, Inc. v. DiChem*, 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Financial Corp.*, 395 U.S. 337 (1969). See *Wheeler, supra*, 69 U. Va. L. Rev. at 277.

It is true that the State of Alabama is not a party to this action. Nonetheless, the Alabama courts have, at Respondents' instigation, directed Pacific Mutual to pay damages of more than \$1 million to Respondents. Accordingly, the actions of the Alabama courts are subject to review in this case under the Due Process Clause. As *amici* have demonstrated above, the Alabama courts' imposition of punitive sanctions against Pacific Mutual violated Pacific Mutual's due process rights because of the absence of any warning to Pacific Mutual -- prior to

the events giving rise to this case -- regarding the potential size of punitive damage awards.

CONCLUSION

Amici respectfully request that the decision of the Alabama Supreme Court be reversed. The case should be remanded to the Alabama Supreme Court with directions to schedule a new trial on the issue of damages (from which all punitive damage issues should be excluded).

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, N.W.
Washington, DC 20035
(202) 857-0240

Dated: June 1, 1990

JUL 13 1990

JOSEPH F. SPANIOL, JR.
CLERK

(31)
No. 89-1279

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

**CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HALGROVE,**

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

**BRIEF FOR
CALIFORNIA TRIAL LAWYERS ASSOCIATION
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

ROLAND WRINKLE

Counsel of Record

HURLEY, GRASSINI & WRINKLE

A Law Corporation

11313 Weddington Street

North Hollywood, California 91601

(818) 763-4318

Attorneys for Amicus Curiae

CALIFORNIA TRIAL LAWYERS ASSOCIATION

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

BEST AVAILABLE COPY

55

No. 89-1279

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HALGROVE,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

**BRIEF FOR
CALIFORNIA TRIAL LAWYERS ASSOCIATION
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

ROLAND WRINKLE

Counsel of Record

HURLEY, GRASSINI & WRINKLE
A Law Corporation

11313 Weddington Street
North Hollywood, California 91601
(818) 763-4318

Attorneys for Amicus Curiae
CALIFORNIA TRIAL LAWYERS ASSOCIATION

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS CURIAE	1
I RECENT LEGISLATIVE CHANGES IN THE STATES' PUNITIVE DAMAGE SYSTEMS ARE HAVING A DRAMATIC EFFECT ON THE SIZE AND NUMBER OF PUNITIVE AWARDS; THE STATES ARE NOT ABUSING THE RIGHTS WHICH THEY RETAINED WHEN THEY ENTERED THE FEDERAL UNION	2
II SUBSTANTIVE AND PROCEDURAL LIMITATIONS ON PUNITIVE DAMAGES ARE NOT ONLY IN PLACE BUT ARE EVOLVING AS THE PRODUCT OF CURRENT LEGISLATIVE PROCESSES— THE CALIFORNIA MODEL	4
A. Statutory Limitations on Punitive Damage Awards	5
1. Procedural Safeguards Applicable To The Assessment Of Punitive Damages	6
2. Limitations On Liability For Punitive Damages	7

	<i>Page</i>
3. Limitations On Actions In Which Punitive Damages Allowed	8
B. Judicial Limitations On Punitive Damages ...	9
1. Constitutional Limitations—In California, Civil Penalties Are Measured Against Due Process Requirements On A Case-By-Case Basis And Those Penalties Which "Demonstrably Overbalance And Outweigh Reasonable Goals Of Punishment, Regulation And Deterrence" Are Invalidated	8
2. Jury Discretion In California Is Anything But "Standardless"	10
(a) California Law Imposes Multiple And Well-Defined Standards Of Proportionality, Which The Trier Of Fact, Trial Court And Reviewing Courts Are Obligated To Apply	10
(b) In California, Evil Motive Is The Central Element Of Malice And Is Not Established By Conduct Which Is Unreasonable, Negligent, Grossly Negligent Or Reckless	12

	<i>Page</i>
(c) The Discretion of California Juries Is Further Checked By Elected Judges Who, On Motions For New Trial, Sit As "Independent Triers Of Fact," And Are Mandated To Reweigh The Evidence And To Review Jury-Decided, Punitive Awards	13
(d) The Discretion Of California Juries Is Still Further Checked By Active And Aggressive Appellate Review	15
(1) Reported Decisions, Each Employing A Proportional Analysis, Produce Punitive Judgments With An Average Percentage Of Net Worth Of 3.41	15
(2) Amicus ACTR's Graph Concerning Recent Trends Is Illusory ...	16
(3) Only 9% of the Punitive Damage Dollars in California Reported Cases Survive Appellate Review	17
III PROPORTIONALITY BASED ON "ANALOGOUS CRIMINAL PENALTIES" IS NOT PROPORTIONAL IF THE ANALYSIS EXCLUDES THE PRINCIPAL MEANS OF DETERRENCE—INCARCERATION	19

IV IF PETITIONER'S SUBSTANTIVE DUE PROCESS ARGUMENT IS ACCEPTED, THEN, IN LIGHT OF <i>McGAUTHA</i> , A SMALL FRACTION OF A PERSON'S ASSETS WILL BE AFFORDED GREATER PROTECTION THAN THAT AFFORDED HIS LIFE	21
V THE REASONS WHICH LED TO THE <i>McGAUTHA</i> RULING APPLY HERE WITH GREATER FORCE—i.e., A MECHANISTIC APPROACH TO SENTENCING, WHICH IS INCAPABLE OF APPLYING REASONED DISCRETION TO INDIVIDUAL CIRCUMSTANCES, IS NO FRIEND OF DUE PROCESS	23
VI PETITIONER DANGEROUSLY BLENDS THIS COURT'S FUNCTION WITH RESPECT TO INTERPRETING FEDERAL STATUTES WITH ITS ROLE IN DETERMINING THE CONSTITUTIONALITY OF STATE STATUTES	25
VII PETITIONER'S EXPANSIVE VIEW OF SUBSTANTIVE DUE PROCESS MAKES THE CONSTITUTIONALIZATION OF STATE COMPENSATORY DAMAGE SYSTEMS INESCAPABLE	27
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page
<i>Aetna Life Ins. Co. v. Lavoie</i> 475 U.S. 813 (1986)	6
<i>Andres v. United States</i> 333 U.S. 740, 68 S.Ct. 880, 92 L.Ed. 1055 (1948) ..	23
<i>Bankers Life and Casualty Co. v. Crenshaw</i> 486 U.S. 71, 108 S.Ct. 1645 (1988)	5,10,13,21
<i>Beagle v. Vasold</i> 65 Cal.2d 166 (1966)	28
<i>Bell v. Sharp Cabrillo Hospital</i> 212 Cal.App.3d 1034 (1989)	13
<i>Bertero v. National General Corp.</i> 13 Cal.3d 43 (1974)	6,28
<i>Browning-Ferris Industries of Vermont v. Kelco Disposal Inc.</i> 492 U.S. _____, 109 S.Ct. 2909 (1989)	2,11
<i>Burnett v. National Enquirer, Inc.</i> 144 Cal.App.3d 991 (1983)	15
<i>Central Alabama Elec. Corp. v. Tapley</i> 546 So.2d 371 (Ala. 1989)	24

	<i>Page</i>
<i>Collins v. Lucky Markets, Inc.</i> 5 Cal.App.3d 705, 85 Cal.Rptr. 350 (1969)	14
<i>Cruzan v. Director, Missouri Dept. of Health</i> — U.S. —, No. 88-1503 (June 25, 1990)	4,22
<i>Devlin v. Kearney Mesa AMC/Jeep/Renault Inc.</i> 155 Cal.App.3d 381, 202 Cal.Rptr. 204 (1984)	15
<i>Duke Power Co. v. Carolina Env. Study Group</i> 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 585 (1980)	28
<i>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.</i> 105 S.Ct. 2939, 472 U.S. 749, 86 L.Ed.2d 593 (1985)	29
<i>Egan v. Mutual of Omaha</i> 24 Cal.3d 809 (1979)	7
<i>Fein v. Permanente Medical Group</i> 38 Cal.3d 137, 695 P.2d 665 (1985)	28
<i>Ferraro v. Pacific Finance Corp.</i> 8 Cal.App.3d 339, 87 Cal.Rptr. 226 (1970)	14
<i>Gagnon v. Continental Casualty Co.</i> 211 Cal.App.3d 1598, 260 Cal.Rptr. 305 (1989)	12
<i>Garcia v. United States</i> 769 F.2d 697 (11th Cir. 1985)	27
<i>Giaccio v. Pennsylvania</i> 382 U.S. 399 (1966)	11

	<i>Page</i>
<i>Gregg v. Georgia</i> 428 U.S. 153 (1976)	28
<i>Grimshaw v. Ford Motor Co.</i> 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981)	16
<i>Hale v. Morgan</i> 22 Cal.3d 388, 584 P.2d 512 (1978)	9
<i>Johnson v. St. Vincent Hospital Inc.</i> 273 Ind. 374, 404 N.E.2d 585 (1980)	28
<i>Little v. Stuyvesant Life Ins. Co.</i> 67 Cal.App.3d 451 (1977)	15
<i>Lockett v. Ohio</i> 438 U.S. 586 (1978)	27,28
<i>McGautha v. California</i> 91 S.Ct. 1459, 402 U.S. 183, 28 L.Ed.2d 711 (1971)	5,22,23,25
<i>McMillan v. Pennsylvania</i> 106 S.Ct. 2411 (1986)	27
<i>Merlo v. Standard Life & Acc. Ins. Co.</i> 59 Cal.App.3d 5 (1976)	15
<i>Moore v. East Cleveland</i> 431 U.S. 494	3
<i>Neal v. Farmers Ins. Exchange</i> 21 Cal.3d 910 (1978)	11,12,14,17

	<i>Page</i>
<i>Parratt v. Taylor</i>	
451 U.S. 527 (1981)	22
<i>People ex rel. Dept. of Transp. v. Grocers Wholesale Co.</i>	
214 Cal.App.3d 498 (1989)	15
<i>Santosky v. Kramer</i>	
495 U.S. 745 (1982)	22
<i>Smith v. Wade</i>	
461 U.S. 30, 103 S.Ct. 1525, 75 L.Ed.2d 632 (1983)	12,26
<i>Solem v. Helm</i>	
463 U.S. 277 (1983)	24
<i>Stevens v. Armontrout</i>	
787 F.2d 1282 (8th Cir. 1986)	27
<i>Triangle Sheet Metal Works, Inc. v. Silver</i>	
154 Conn. 116, 222 A.2d 220 (1966)	3
<i>Walton v. Arizona</i>	
___ S.Ct. ___, 58 U.S.L.W. 4992 (June 27, 1990)	8
<i>Waters-Pierce Oil Co. v. Texas</i>	
212 U.S. 86 (1909)	4

Rules

California Rules of Court, rule 977(a)(b)(1)-(2)	18
--	----

State Statutes

Alabama Code (Supp. 1988):	
§ 6-11-20	2
§ 6-11-21	3
Alabama Criminal Code:	
§ 13A-5-2(e)	20
§ 13A-5-6	20
§ 13A-5-7	20
Alaska Statutes, § 09.17.020 (Supp. 1988)	2
California Civil Code:	
§ 48a	7
§ 956	8
§ 3294	2,8
§ 3294(a)	6,7
§ 3294(b)	7
§ 3294(c)	7
§ 3295	2
§ 3295(a)	6
§ 3295(d)	6
§ 3340	8
California Code of Civil Procedure:	
§ 425.13	6
§ 662.5	14
§ 734	8
California Government Code:	
§ 818	8

Colorado Revised Statutes (Supp. 1986):	
§§ 13-21-102, 13-25-127	2
§ 13-21-102(1)(a)	3
Connecticut General Statutes,	
§ 52-240(b) (Supp. 1989)	2
Florida Statutes Annotated (West Supp. 1989),	
§§ 768.72 through 768.74	2,3
Georgia Code Annotated,	
§ 51-12-5.1 (Supp. 1989)	2,3
Idaho Code, § 6-1604 (Supp. 1989)	2
Illinois Annotated Statutes,	
Ch. 110, §§ 2-604.1, 2-1207	
(Smith-Hurd Supp. 1989)	2
Indiana Code Annotated,	
§ 34-4-34-2 (Burns 1986)	2
Iowa Code Annotated, § 668A.1 (West 1987)	2
Kansas Code of Civil Procedure Annotated,	
§§ 60-3701 through 60-3703	
(Vernon Supp. 1989)	2,3
Kentucky Revised Statutes,	
§§ 411.184, 411.186 (1988)	2
Minnesota Statutes Annotated,	
§§ 549.191, 549.20 (West 1988)	2
Missouri Annotated Statutes:	
§ 510.263 (Vernon Supp. 1990)	2
§ 537.675 (Vernon Supp. 1988)	2
Montana Code Annotated, § 27-1-221 (1987)	2
Nevada Revised Statutes Annotated (Supp. 1989):	
§ 42.005	2
§ 42.005.1	3
New Hampshire Revised Statutes Annotated,	
§ 507:16 (Supp. 1988)	2
New Jersey Statutes Annotated,	
§ 2A:58C-5 (West 1987)	2

North Dakota Century Code,	
§ 32-03.2-11 (Supp. 1987)	2
Ohio Revised Code Annotated,	
§ 2315.21 (Page Supp. 1988)	2
Oklahoma Statutes Annotated,	
Tit. 23, § 9 (West 1987)	2,3
Oregon Revised Statutes (1987):	
§ 18.540,	2
§ 30.925	2
§ 41.315	2
South Carolina Code Annotated,	
§ 15-33-135 (Supp. 1988)	2
South Dakota Revised Code, § 21-1-4.1 (1987)	2
Texas Codes Annotated (Vernon Supp. 1990):	
Civil Practice & Remedies, § 41.001	2
Civil Practice & Remedies, § 41.007	3
Utah Code Annotated, § 78-18-1 (Supp. 1989)	2
Virginia Code Annotated, § 8.01-38.1 (Supp. 1989) ...	2

California Jury Instructions

Book of Approved Jury Instructions, Civil (BAJI)	
No. 14.71	8,12
No. 14.72.1	12
No. 14.73	12
No. 14.73.1	12
No. 14.74	7

Texts

4 Blackstone, <i>Commentaries</i> 371	11
" <i>The Federalist Papers</i> " No. 45 (J. Madison)	29
Speiser, <i>Recovery for Wrongful Death</i> (2d ed. 1975) Ch. 7	29
Benjamin N. Cardozo, The Storrs Lectures, Lecture III, from " <i>The Nature of the</i> <i>Judicial Process</i> "	29

Periodicals

42 A.L.R.3d 229	29
-----------------------	----

Conventions

Warsaw Convention, 49 Stat., Part II, 3000, Treaty Series No. 876	28
--	----

**BRIEF FOR
CALIFORNIA TRIAL LAWYERS ASSOCIATION
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

INTEREST OF AMICUS CURIAE

The California Trial Lawyers Association ("CTLA"), founded in 1962, is a voluntary organization composed of approximately 5,000 trial lawyers who appear regularly in state and federal courts. The predominant practice of most CTLA members is the representation of injured tort victims and victims of consumer fraud. As such, CTLA is concerned with issues which implicate the rights of victims and consumers.¹

CTLA believes Petitioner and its amicus, Association For California Tort Reform (ACTR), has presented a distorted view of what is really going on in the States with respect to punitive damage judgments *which defendants are actually ordered to pay*. As their "tort reform" movement marches from its substantial successes in the state legislatures to this Court, the requested radicalization of the federal relationship with respect to state tort law will dramatically alter not only punitive damages, but also compensatory damages and criminal sentencing—matters traditionally reserved to the states. It is these issues which CTLA wishes to discuss.

¹ A letter consenting to the filing of this amicus curiae brief by counsel for respondents is being filed concurrently. Pursuant to an agreement between counsel for petitioners and respondents, such consent from counsel for the party in whose support the amicus curiae brief is being filed is deemed to be consent from both counsel.

RECENT LEGISLATIVE CHANGES IN THE STATES' PUNITIVE DAMAGE SYSTEMS ARE HAVING A DRAMATIC EFFECT ON THE SIZE AND NUMBER OF PUNITIVE AWARDS; THE STATES ARE NOT ABUSING THE RIGHTS WHICH THEY RETAINED WHEN THEY ENTERED THE FEDERAL UNION.

As "tort reform" sweeps the nation, lobbyists for insurance and business concerns, such as ACTR, are getting much of what they are asking for. As a result, punitive damages have been sharply limited in recent years through new "tort reform" legislation. As of this date, the majority of states have enacted laws significantly restricting punitive damages.²

Lobbyists such as ACTR have been massively successful in convincing state legislatures to select a variety of restrictive

²See Ala. Code § 6-11-20 *et seq.* (Supp. 1988); Alaska Stat. § 09.17.020 (Supp. 1988); Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990); Colo. Rev. Stat. §§ 13-21-102, 13-25-127 (Supp. 1986); Conn. Gen. Stat. § 52-240(b) (Supp. 1989) (applicable to product liability cases); Fla. Stat. Ann. §§ 768.72 through 768.74 (West Supp. 1989); Ga. Code Ann. § 51-12-5.1 (Supp. 1989); Idaho Code § 6-1604 (Supp. 1989); Ill. Ann. Stat. ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989); Ind. Code Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1 (West 1987); Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989); Ky. Rev. Stat. §§ 411.184, 411.186 (1988); Minn. Stat. Ann. §§ 549.191, 549.20 (West 1988); Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990), 537.675 (Vernon Supp. 1988); Mont. Code Ann. § 27-1-221 (1987); Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988); N.J. Stat. Ann. § 2A:58C-5 (West 1987) (applicable to product liability cases); N.D. Cent. Code § 32-03.2-11 (Supp. 1987); Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. §§ 30.925 (applicable to product liability cases) 18.540, 41.315 (1987); S.C. Code Ann. § 15-33-135 (Supp. 1988); S.D. Rev. Code § 21-1-4.1 (1987); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 *et seq.* (Vernon Supp. 1990); Utah Code Ann. § 78-18-1 (Supp. 1989); Va. Code Ann. 8.01-38.1 (Supp. 1989).

devices from their agenda. However, only nine states have adopted the one device which is most important to Petitioner and its amici—a cap on the dollar amount of punitive awards.³ Other states may well decide to follow the lead and place a statutory outer limit on such awards. Such is the proper business of legislatures. However, due to either impatience with the deliberative processes of the state legislatures, or frustrated by temporary defeats before some state legislatures, the insurance and business community has now turned to this Court to give it the device it most cherishes by finding within the boundaries of the Fourteenth Amendment a cap on punitive damages.⁴

Thus, in the very midst of the current debate going on within the state legislatures, and in order to short-circuit that process, the insurance and business lobby is (to borrow the words of Justice White from *Moore v. East Cleveland*, 431 U.S. 494, 544) asking the Judiciary "to pre-empt[] for itself another part of the governance of the country without express constitutional authority."

What makes this short-circuiting and pre-empting of a function ordinarily reserved to the states particularly sad and tragic is the empirical fact that these newly-enacted punitive damage reforms are having a dramatic effect in limiting such awards.

³See Ala. Code § 6-11-21; Colo. Code § 13-21-102(1)(a); Fla. Code § 768.73(1)(a); Georgia Code § 51-12.5.1(g); Kansas Code § 60-3701(c); Nevada Code § 42.005.1; Oklahoma Code Title 23, § 9; Texas Code § 41.007; Virginia Code § 8.01-38.1. In addition, the Connecticut Supreme Court, in *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116, 222 A.2d 220 (1966), held that an award of punitive damages is limited to plaintiff's litigation expenses less taxable costs.

⁴If this Court imposes such a restriction on the State legislatures, then Michael Milken ought to think twice about a plea bargain which could result in 600 million dollars in penalties.

California's Tort Reform Act, which included extraordinary changes as to punitive damages, went into effect on January 1, 1988. From 1987 to 1988, the number of punitive damage verdicts in excess of \$100,000 went from 62 to 29, i.e., a reduction of 53%! The difference in the total amount of punitive awards from 1987 to 1989 represents a reduction of 60%! (See Appendix A and page 4 of Brief of ACTR.)

Thus, while the state "laboratories" are not only in fact experimenting with devices to limit and circumscribe punitive awards based upon the economic and social theories adopted by each state, and as these experiments are beginning to show positive and dramatic results, Petitioner and its amici seek to have this Court simply shut that process down and impose a "constitutionally"-mandated cap on punitive awards. This, the Framers did not envision.⁵

II

SUBSTANTIVE AND PROCEDURAL LIMITATIONS ON PUNITIVE DAMAGES ARE NOT ONLY IN PLACE BUT ARE EVOLVING AS THE PRODUCT OF CURRENT LEGISLATIVE PROCESSES—THE CALIFORNIA MODEL

If it is assumed that Due Process serves as a check on punitive damage awards that are "so severe and oppressive as to be wholly disproportionate to the offense or obviously unreasonable" (*Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909)), and it is assumed that "Due Process requires more" (Brief of Petitioner at 49), and it is assumed that this is one of

⁵This Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself." *Cruzan v. Director, Missouri Dept. of Health*, ___ U.S. ___, No. 88-1503 (June 25, 1990) (Scalia, J., concurring.)

those "rare occasions"⁶—unlike capital sentencing, unlike defamation awards and unlike compensatory tort awards in general—where the Court chooses to dictate the use of specific devices to the states with respect to their punitive damage systems, what devices are mandated by the Fourteenth Amendment?

Petitioner gives the Court no guidance whatsoever. It seeks imposition of a "range of permitted punishment" but offers not a clue as to the form or substance of whatever it sees lurking within the Due Process Clause.

Respondents, on the other hand, have addressed themselves to the "active re-examination underway in the States" as a response to this Court's invitation in *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645 (1988) to "enact legislation addressing punitive damage awards," 108 S.Ct. at 1651. Respondents discuss the array of creative and innovative devices and procedures being enacted by the state legislatures to limit and channel punitive damage awards so as to meet the social and economic policy goals which have been adopted through the balancing process of each individual legislature (Respondents' Brief in Opposition at 19-21).

The recent restructuring of its punitive damage system by an increasingly more conservative California Legislature and Judiciary is illustrative of the appropriate exercise of the States' power (in direct response to the electorate) "to choose among competing social and economic theories in the ordering of life within their respective jurisdictions" and (to paraphrase Justice Brennan (from *McGautha*, *supra*)), to determine for themselves the criteria under which malicious tortfeasors should be assessed punitive damages.

⁶*McGautha v. California*, 91 S.Ct. 1459, 402 U.S. 183, 28 L.Ed.2d 711 (1971).

A. Statutory Limitations on Punitive Damage Awards.

Since originally enacting the basic punitive damage statute, Civil Code section 3294,⁷ in 1872, the California Legislature has frequently and regularly made various policy decisions, selecting from a menu of competing economic and social policies.

1. Procedural Safeguards Applicable To The Assessment Of Punitive Damages.⁸

(a) Civil Code section 3295(d) [mandatory bifurcation of trial; preclusion of evidence of defendant's profits or financial conditions until finding of malice, fraud or oppression; right to same jury].

(b) Civil Code section 3294(a) ["clear and convincing" standard of proof required].

(c) Civil Code section 3295(e) [prohibition against stating amount of punitive damages in claim].

(d) Civil Code section 3295(a) [protective order requiring plaintiff to produce evidence of a prima facie case of malice, fraud or oppression prior to introduction of evidence of defendant's profits or financial condition].

(e) Civil Code section 3294(a) [prohibition on pretrial discovery of defendant's net wealth without a prima facie showing of malice, fraud or oppression].

(f) Code of Civil Procedure section 425.13 [court order

⁷California is one of eight states whose punitive damage systems are based on statute as opposed to the common law. Nonetheless, it is a codification of the common law. *Bertero v. National General Corp.*, 13 Cal.3d 43, 66, n.13 (1974).

⁸Most of these safeguards were instituted by the 1987 Tort Reform Act which was passed subsequent to the "warning shot" fired in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

required to plead punitive damages against health care provider).

(g) Civil Code section 48a [hatred or ill will toward plaintiff required for punitive damages against media].

2. Limitations On Liability For Punitive Damages.

(a) Civil Code section 3294(b) (no vicarious liability for punitive damages and no punitive damages based on respondeat superior).⁹

(b) Civil Code section 3294(a) (punitive damages permissible only upon clear and convincing showing of malice,¹⁰ fraud or oppression).

(c) Civil Code section 3294(c) ("(1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a wilful and conscious disregard of the rights

⁹(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." Section 3294(b).

The California Supreme Court has defined "managerial capacity," and juries are instructed, as follows: "An agent or employee acts in a managerial capacity where the degree of discretion permitted the agent or employee in making decisions is such that the agent's or employee's decisions will ultimately determine the business policy of the principal or employer." Book of Approved Jury Instructions, Civil, Instruction No. 14.74; *Egan v. Mutual of Omaha*, 24 Cal.3d 809, 822 (1979).

¹⁰As originally enacted, section 3294 permitted punitive damages upon a showing of "malice, express or implied." The statute was amended to delete the words "express or implied."

or safety of others. [The Book of Approved Jury Instructions, Civil, provides that the jury is to be instructed as follows: "Despicable conduct" is conduct which is so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people." (Instruction No. 14.71.)) (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.")¹¹

3. Limitations On Actions In Which Punitive Damages Allowed.

- (a) Civil Code section 3294 [not allowable in contract actions].
- (b) Civil Code section 956 [not allowed in wrongful death action].
- (c) Code of Civil Procedure section 734 [certain trespasses, actual damages only].
- (d) Government Code section 818 [no punitive damages against governmental entity].
- (e) Civil Code section 3340 [injury to animals].

¹¹Compare *Walton v. Arizona*, ____ S.Ct. ____, 58 U.S.L.W. 4992 (June 27, 1990) where the Court upheld, against a charge of unconstitutional vagueness and as providing "sufficient guidance to the sentences," Arizona's definitions of its "especially heinous, cruel or depraved" aggravating factor which is a necessary predicate, under Arizona's death penalty statute, to a capital sentence. ("[A] crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death." "Depraved" was defined as when the perpetrator "relishes the murder, evidencing debasement or perversion," or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the killing.)

B. Judicial Limitations On Punitive Damages.

1. Constitutional Limitations—In California, Civil Penalties Are Measured Against Due Process Requirements On A Case-By-Case Basis And Those Penalties Which "Demonstrably Overbalance And Outweigh Reasonable Goals Of Punishment, Regulation And Deterrence" Are Invalidated.

The California Supreme Court is not the least bit hesitant to invalidate a civil penalty in any given case based on the Due Process Clauses in the federal and state constitutions:

"The due process clauses, federal and state, are the most basic substantive checks on government's power to act unfairly or oppressively. As such, they protect against infringements by the state upon those 'fundamental' rights 'implicit in the concept of ordered liberty.' (*Palko v. Connecticut* (1937) 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288.)

* * *

"The due process shield, while protecting life and liberty, of course, has similar application in the protection of property. Courts have consistently assumed that 'oppressive' or 'unreasonable' statutory penalties may be invalidated as violative of due process. (See, e.g., *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 642, 268 P.2d 723.) We therefore examine section 789.3 to determine whether, either as enacted or as specifically applied (*Boddie v. Connecticut* (1971) 401 U.S. 371, 379-380, 91 S.Ct. 780, 28 L.Ed.2d 113), the penalties therein authorized are reasonable and proper or arbitrary and oppressive." *Hale v. Morgan*, 22 Cal.3d 388, 398-399, 584 P.2d 512 (1978).

In *Hale*, the court concluded that the imposition of a \$17,300 penalty against an unsophisticated landlord under a statute which assesses a penalty of \$100 per day against a landlord who wilfully deprives his tenant of utility services for purposes of evicting the tenant was constitutionally excessive and violative

of due process. As the California Supreme Court observed:

"Though the Legislature need not, of course, precisely adjust its regulatory efforts to ensure exact justice in every case, neither may it, in defiance of due process requirements, compel the exaction of penalties which, in a particular case, demonstrably overbalance and outweigh reasonable goals of punishment, regulation and deterrence." (*Id.* at 402.)

* * *

"Where, as here, a penal statute may be subject to both constitutional and unconstitutional applications courts evaluate the propriety of the sanction *on a case-by-case basis*." (*Id.* at 404; emphasis added.)

* * *

"We are of the view however, that under all of the circumstances of this case the amount of the penalties is constitutionally excessive." (*Id.* at 405; emphasis in original.)

"Similarly, in *Walsh v. Kirby* (1974) 13 Cal.3d 75, 118 Cal.Rptr. 1, 529 P.2d 33, the California Supreme Court held cumulative penalties violative of Due Process principles.

2. Jury Discretion In California Is Anything But "Standardless."

(a) California Law Imposes Multiple And Well-Defined Standards Of Proportionality, Which The Trier Of Fact, Trial Court And Reviewing Courts Are Obligated To Apply.

During oral argument in *Bankers Life*, Justice Scalia asked counsel for Plaintiff and Respondent whether a criminal statute would be constitutional (presumably under the Due Process clause) if the fine were jury-determined and limited only by: (1) "It shall not shock the judicial conscience," (2) "it shall not deprive the defendant of a livelihood," and (3) "it shall not be disproportionate to the offense" (Transcript, Monday, Novem-

ber 30, 1987, at 40). That question would never have to be asked under California law.

"In making the indicated assessment we are afforded guidance by certain established principles, all of which are *grounded in the purpose and function of punitive damages*. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility,¹² and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. [Citations.] Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionately high amount of punitive damages if the actual harm suffered thereby is small. [Citation.] Also to be considered is the wealth of the particular defendant;¹³ obviously, the function of deterrence . . . will not

¹²Petitioner's amicus, The Association For California Tort Reform, argues that "'Reprehensibility' Provides No Meaningful Guidance To A Jury" (Brief of ACTR at 10). Although the word has been found vague in other circumstances (see *Giaccio v. Pennsylvania*, 382 U.S. 399, 404-405 (1966)), it must be viewed in context here. The jury does not determine the amount of punitive damages unless it has already determined that the conduct of the defendant was malicious, oppressive, or fraudulent. The term "reprehensible" relates to that prior determination. The jury merely considers the proved conduct as part of its analysis to determine the appropriate amount to punish the defendant.

¹³ACTR, as amicus for Petitioner, argues that evidence of wealth "becomes less and less meaningful as 'wealth increases, to the point of providing no guidance whatsoever when a multi-million or multi-billion dollar corporation is involved.'" (Brief of ACTR at 10-11.)

To the contrary, the cases discussed herein (see, e.g., *Neal v. Farmers Ins. Exchange*, *infra*, 21 Cal.3d 910, 929), demonstrate that using wealth as a factor produces reasonable awards when considered as a percentage of net worth or earnings. Petitioner and amicus' real complaint is that the wealth factor

(continued...)

be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." *Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d 910, 928, 148 Cal.Rptr. 389 (1978).

California juries are strictly instructed to follow each of these "established principles" in formulating an award of punitive damages. (See Book of Approved Jury Instructions, Civil, BAJI Nos. 14.71 (1989 Revised), 14.72.1 (1989 Re-Revision), 14.73 (1989 New), and 14.73.1 (1989 New).¹⁴ The jury is also given the statutory definitions of "malice," "fraud" and "oppression" as well as the above-referenced definition of "despicable conduct." (*Id.*)

¹³(...continued)

means that deterrence considerations may result in larger awards against wealthier defendants. This is as it should be. Indeed, in her dissent in *Browning-Ferris*, Justice O'Connor quoted as follows from 4 Blackstone, *Commentaries*, page 371: "[T]he quantum, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's." (109 S.Ct. at 2933.)

The "ratio-of-punitive-damages-to-actual-damages" factor is similar to the "wealth" factor. It is capable of mathematical determination. The fact that it may be subjugated to the other factors on occasion (*Neal v. Farmer Ins. Exchange, infra*, 21 Cal.3d 910, 929), does not render it or the whole scheme of guidelines vague.

¹⁴A punitive award rendered by a jury which has not been instructed that the award must bear a reasonable relationship to the compensatory damages is subject to reversal. *Gagnon v. Continental Casualty Co.*, 211 Cal.App.3d 1598, 260 Cal.Rptr. 305 (1989).

(b) In California, Evil Motive Is The Central Element Of Malice And Is Not Established By Conduct Which Is Unreasonable, Negligent, Grossly Negligent Or Reckless.

In *Smith v. Wade*, 461 U.S. 30, 48, 103 S.Ct. 1625, 1636, 75 L.Ed.2d 632 (1983), this Court observed that most cases under state common law permit punitive damages based on "recklessness, . . . or even gross negligence."¹⁵ Not so in California.

"*Animus malus* or evil motive, . . . is the central element of the malice which justifies an exemplary award. [Citation.]" . . .

"[S]ection 3294 views evil motive as the central essential factor in the malice which justifies an exemplary award. That factor calls upon the jury to assess the defendant's actual state of mind; it is not satisfied by characterizing his conduct as unreasonable, negligent, grossly negligent or reckless."¹⁶ [Citation.]" *G.D. Searle & Co. v. Superior Court of Sacramento*, 49 Cal.App.3d 22, 30-31, 122 Cal.Rptr. 218, 223-224 (1975).

"Malice as used in Civil Code section 3294 means malice in fact, not malice in law. [Citation.] 'There must be an intent to vex, annoy or injure. Mere . . . negligence, even gross negligence is not sufficient to justify an award of punitive damages' (quoting *Ebaugh v. Rabkin* (1972) 22 Cal.App.3d 891, 894, 99 Cal.Rptr. 706, 709)." *Simmons v. So. Pac. Trans. Co.*, 62 Cal.App.3d 341, 368, 133 Cal.Rptr. 42, 58 (1976).

¹⁵Indeed, the majority itself in *Smith v. Wade* rejected the position of the dissent that punitive damages should only be available for a violation of 42 U.S.C. § 1983 upon a showing of "some degree of bad faith or improper motive"

¹⁶A showing of constructive knowledge is insufficient. *Bell v. Sharp Cabrillo Hospital*, 212 Cal.App.3d 1034 (1989).

(c) The Discretion of California Juries Is Further Checked By Elected Judges Who, On Motions For New Trial, Sit As "Independent Triers Of Fact," And Are Mandated To Reweigh The Evidence And To Review Jury-Decided, Punitive Awards.

In *Bankers Life*, Justice O'Connor observed that, under Mississippi law, "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury" (108 S.Ct. at 1656, quoting the opinion below). *This is not the law in California.*

"[T]he trial court, in ruling on the [new trial] motion, sits not in an appellate capacity but as an independent trier of fact." *Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 933, 148 Cal.Rptr. 389, 402 (1978).

"The trial judge not only has the discretion to grant a new trial on the ground of excessive damages, but it is his duty to do so, or to provide for a reduction of the verdict, if under the evidence he believes it to be too large. . . .

"As heretofore indicated the 1967 amendments to Code of Civil Procedure, section 657 eliminated the words 'appearing to have been given under the influence of passion or prejudice' as part of the stated ground for granting a new trial for excessive damages. . . .

"[I]t is the exclusive province of the trial court to judge the credibility of the witnesses, to determine the probative force of testimony and to weigh the evidence, and it may draw reasonable inferences therefrom opposed to those drawn by the trier of fact at the trial." (Quoting *Yarrow v. State of California*, 53 Cal.2d 427, 434, 2 Cal. Rptr. 137.) *Collins v. Lucky Markets, Inc.*, 5 Cal.App.3d 705, 85 Cal.Rptr. 350, 458-459 (1969).

California Code of Civil Procedure section 662.5 provides for the trial court to issue a remittitur "of so much [of the verdict] as the court in its independent judgment determines from the evidence to be fair and reasonable" (emphasis added). *Also*

see Neal v. Farmers Ins. Exch., supra.

"It has been repeatedly held that after a jury award of exemplary damages, it becomes the province of the trial court on motion for new trial to say whether the amount is excessive." *Ferraro v. Pacific Finance Corp.*, 8 Cal. App.3d 339, 351, 87 Cal.Rptr. 226, 233 (1970).

Thus, judges who are elected by the citizenry of California are mandated to sit as independent triers of fact and to exercise broad powers to limit any award of punitive damages.

(d) The Discretion Of California Juries Is Still Further Checked By Active And Aggressive Appellate Review.

(1) Reported Decisions, Each Employing A Proportional Analysis, Produce Punitive Judgments With An Average Percentage Of Net Worth Of 3.41.

The proportional analysis which Petitioner asks this Court to constitutionally impose on the states with respect to punitive damages (and, presumably, to have the federal courts review on a case-by-case basis) is already in place and functioning well in California. In *Devlin v. Kearney Mesa AMC/Jeep/Renault Inc.*, 155 Cal.App.3d 381, 202 Cal.Rptr. 204 (1984), the court performed a summary review of reported decisions to proportionally compare punitive damage awards, after appellate review, as a function of the defendant's net worth and net income. The court attached the results of its survey as an appendix to its decision. The study revealed that the average "percentage of net worth" ratio was 3.41% and the average "percentage of net income" ratio was 3.14%.

Based on this survey, the California Court of Appeal recently, in *The People ex rel. Dept. of Transp. v. Grocers Wholesale Co.*, 214 Cal.App.3d 498 (1989), reversed a punitive award of \$75,000 reasoning that punitive damage awards which are "significantly lower" than 10% of the defendant's net worth are

indeed the norm."¹⁷

(2) Amicus ACTR's Graph Concerning Recent Trends Is Illusory.

The brief of the Association For California Tort Reform, as amicus for Petitioner, contains a chart purporting to summarize punitive damage jury verdicts in California from 1976 to 1989, and a graph visually depicting the survey results. (*Id.* at 4-5.) Nothing could be more misleading.

First, one verdict rendered in each of the three years (*i.e.*, 1978, 1985 and 1988)—which years tower over the other years in ACTR's "graph" like giraffes among Pygmies—amounts to 91%, 34% and 52%, respectively, of that year's total awards!¹⁸

¹⁷See *Burnett v. National Enquirer, Inc.*, 144 Cal.App.3d 991, 1011-1012 (1983) [award equalling 15% of net worth excessive]; *Little v. Stuyvesant Life Ins. Co.*, 67 Cal.App.3d 451, 469-470 (1977) [award equalling 15% of net worth excessive]; and *Merlo v. Standard Life & Acc. Ins. Co.*, 59 Cal.App.3d 5, 18 (1976) [award exceeding 30% of net worth excessive].

¹⁸The punitive damage award in *Grimshaw v. Ford Motor Co.*, which constitutes 91% of the first (*i.e.*, 1978) of the three tall towers which stand out in the graph in ACTR's brief, never even saw the light of appellate review. The trial judge remitted 97.2% of the award. As drastically remitted, this amount was affirmed on appeal. *Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 174 Cal.Rptr. 348 (1981). By factoring into the chart the actual judgment in *Grimshaw*, instead of the historical curiosity of the verdict, ACTR's first towering bar on its graph shrinks to the width of the pencil line used to draw it. Moreover, this aberrant verdict is hopefully a reflection that the defendant's conduct was aberrant. Evidence was introduced at trial that showed the automaker calculated it was cheaper to pay damages to the families of those killed in fiery crashes than to install a \$25 part.

The foundation of the second big year in the graph was *Micro/Vest v. Computerland*. The punitive award there was a mere 30% of the compensatory award of \$416,000,000 in an on-going battle between a computer giant and its investors.

The third verdict, which represents over one-half of the third towering bar (*i.e.*, 1988) on ACTR's graph is the massive "Technical Equities" fraud case in which \$50,000,000 was fraudulently extracted from the public through the
(continued...)

Shorn of these three doppelgangers, the past five years in California have demonstrated a decidedly and steady downward trend in both the number and dollar amount of punitive damage verdicts in California! The "punitive monster" which Petitioner and amicus see "growing on the civil side" (Brief of ACTR at 3) is indeed a phantasm.

(3) Only 9% of the Punitive Damage Dollars in California Reported Cases Survive Appellate Review.

As Petitioner and its amici exhort the lack of due process in state punitive damage systems,¹⁹ the exclusive focus is upon the verdict of the jury. Petitioner offers the Court, as an appendix, a list of jury verdicts and refers the Court to their amicus ACTR's similar appendix to impress upon the Court "the sheer magnitude of present punitive damages awards" (Brief of Petitioner at 37.) What Petitioner ignores is—at least in California—only 9% of such awards in published decisions

¹⁸(...continued)

Technical Equities corporate shell. That verdict has not resulted in any judgment. The case is still before an intermediate state court of appeal.

¹⁹ACTR, as amicus for Petitioner, has provided the Court with a chart purporting to provide information concerning the results of new trial motions as to punitive awards (Appendix B). The accuracy of the chart is, again, questionable. Unable to check every "source" for accuracy, the author of CTLA's Brief herein simply noticed that one of the cited cases, *Kasparian v. Fremont Indemnity* (*id.* at B-28) was handled by him and, therefore, he was personally aware of the results of the new trial motion. Although ACTR states that the motion was "denied," in fact the trial court remitted a substantial portion of the punitive award. The case is currently on appeal. Since the authors of ACTR's brief clearly would not misrepresent this information, it is obvious that the "source" of their "study" was, at least in some respects, inaccurate. In California, the trial judge does not directly order that a portion of an award be remitted. Rather, he grants a new trial unless the plaintiff agrees to such a remittitur. If the remittitur is accepted, then the motion for new trial is "denied." *Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 148 Cal.Rptr. 389, 582 P.2d 980 (1978). This may be part of the problem with ACTR's statistical "study."

ever survive the appellate process, which is as much a part of the punitive damage system as the jury verdict. Attached hereto as Appendix A is a fairly exhaustive chart of available opinions of the California Courts of Appeal and Supreme Court, decided between 1922 and 1986, in which the excessiveness of a punitive award was examined.²⁰ The amount of the award, and how it was treated by the trial and reviewing courts, is analyzed for each of 71 cases. Such empirical analysis definitively dispels the wholly unsupported and pejorative notion that, in California at least, the substantive and procedural due process rights of punitive damage defendants are left unchecked.

Out of all 71 cases, in 42 (or 60%), the courts have ordered the punitive award to be either reduced or reversed. Out of the 23 cases involving awards of \$500,000 or more, 18 (or 78%) have been reduced or reversed. Out of the 19 cases involving awards of one million dollars or more, 16 (or 85%) have been reversed or remanded. Out of the total dollar amount of all 71 punitive awards, 91% have been judicially excised, *leaving only 9% to serve as the basis of a final judgment against the defendant.*

Even the statistics set forth in amicus ACTR's brief (*see* Appendix B, Figure 2, and pp. 6-7 of their Brief), the accuracy of which is questionable (*see* footnote 21 herein), indicate that trial judges—before any appellate court scrutiny—*grant new trials or remit punitive awards 46% of the time and reduce such awards by 45%.*

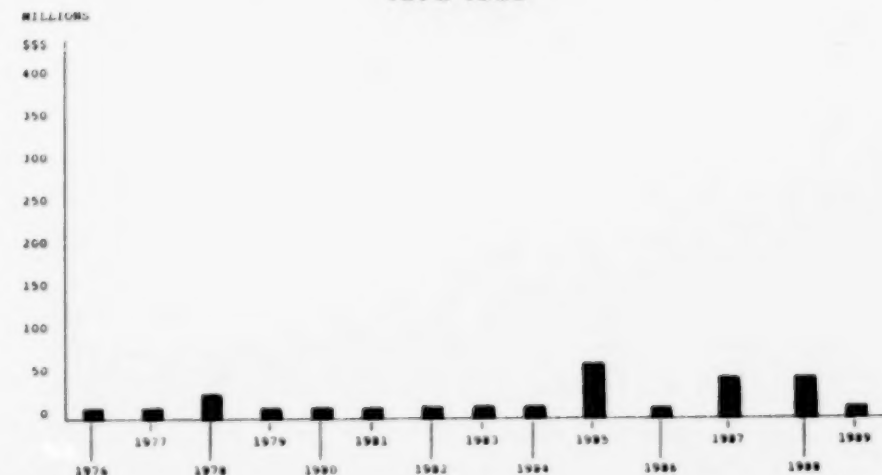
Petitioner refers to appellate review as involving "no more than the 'gentle test of excessiveness'" (Brief of Petitioner at 47). Yet, while its amicus, ACTR, uses a bar graph to demon-

²⁰In California, unpublished appellate opinions are not available and only published opinions may be used as precedent to guide the courts in conducting any proportional analysis of punitive damage awards. California Rules of Court, rule 977(a)(b)(1)-(2).

strate "trends" with respect to jury *verdicts*, when it discusses *trial court review* of such verdicts, it switches to a pie chart so that these "trends" will not be revealed. When it comes to *appellate review*, ACTR simply ignores it.

A jury has no power to deprive any civil defendant of anything. Only a final judgment—entered after a full opportunity for review by the trial court and by the courts of appeal—can command the payment of money from a civil defendant. If the raw verdict statistics of ACTR's bar graph is reduced to the 9% of punitive awards which actually go to final judgment, it would look like this:

CALIFORNIA JURY *FINAL JUDGMENTS* OVER \$100,000
1976-1989



CALIFORNIA PUNITIVE DAMAGE *FINAL JUDGMENTS*
FOR \$100,000 OR MORE

III

PROPORTIONALITY BASED ON "ANALOGOUS CRIMINAL PENALTIES" IS NOT PROPORTIONAL IF THE ANALYSIS EXCLUDES THE PRINCIPAL MEANS OF DETERRENCE—INCARCERATION.

Advancing its "disproportionate award/due process" theory, Petitioner asks:

"Compare the recent punitive damages award in Appendix A to the statutory criminal fines in Appendix B. They are shockingly disproportionate" (Brief of Petitioner at 34.)

Petitioner's Appendix B lists the fines for Class A felonies as \$20,000, Class B felonies as \$10,000, Class C felonies as \$5,000 (Ala. Crim. Code §§ 13A-5-11), Class A misdemeanors as \$2,000, Class B misdemeanors as \$1,000, and Class C misdemeanors as \$500 (Ala. Crim. Code §§ 13A-5-12). Then, by comparing these penalties to punitive damage awards, the disproportion becomes "shocking."

However, Petitioner is comparing the height of a giraffe to the length of an elephant's trunk, while pretending the rest of the elephant doesn't exist. Petitioner completely ignores the principal aspect of the penalty for felonies and misdemeanors, *i.e.*, incarceration. Class A felonies in Alabama carry a mandatory prison term of 10-99 years; Class B felonies, 2-20 years; Class C felonies, 1-10 years (Ala. Crim. Code § 13A-5-6); Class A misdemeanors, up to one year; Class B misdemeanors, up to six months; and Class C misdemeanors, up to three months (Ala. Crim. Code § 13A-5-7). Moreover, section 13A-5-2(e) reserves to the court the right "to forfeit property, dissolve a corporation, suspend or cancel a license . . . or impose any other lawful civil penalty."

Thus, a true *proportionate* analysis would compare the \$1,000,000 punitive damage award (whether it represents one week or one month of net income to the defendant) with the

above stated "analogous" criminal penalties. These "analogous" penalties range from 99 years in jail and a \$25,000 fine to three months in jail and a \$500 fine. Apart from implications of stigma, probation, loss of voting rights, and recidivist problems associated with a criminal sentencing, a corporate defendant earning \$1,000,000 a week in net income would suffer a loss of income of \$120,000,000 for a Class C misdemeanor, \$240,000,000 for a Class B misdemeanor, and \$480,000,000 for a Class A misdemeanor.

As it compares the entirety of civil punitive damage awards with only a minor aspect of criminal penalties (*i.e.*, fines) while ignoring the principle element (*i.e.*, imprisonment), the "analogous criminal penalties" argument is spurious.

IV

IF PETITIONER'S SUBSTANTIVE DUE PROCESS ARGUMENT IS ACCEPTED, THEN, IN LIGHT OF *McGAUTHA*, A SMALL FRACTION OF A PERSON'S ASSETS WILL BE AFFORDED GREATER PROTECTION THAN THAT AFFORDED HIS LIFE.

The current debate was framed by Justice O'Connor in her concurrence in *Bankers Life*, at 486 U.S. 87-88:

" . . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."

Justice Blackmun, in his majority opinion in *Browning-Ferris*, stated the issue as follows:

" . . . whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit."

The subject of this debate is punitive damage awards extracted from defendants, who maliciously or fraudulently injure others, and which amount to a small percentage of their

net worth or net income.²¹

When this Court examined the due process implications of state systems for sentencing defendants to death in *McGautha v. California*, 91 S.Ct. 1454, 402 U.S. 183, 28 L.Ed.2d 711 (1971), it held as follows:

"In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that *committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.*[] The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel." (Emphasis added.)

As Justice Douglas pointed out in his dissent in *McGautha*: "Under Ohio law the determination of whether to grant or withhold mercy is exclusively for the jury and cannot be reviewed by either the trial court or an appellate court."

The question, then, becomes as obvious as it is simple: Even if the amount of a punitive damage award were the product of "standardless jury discretion," why is the deprivation of a small amount of a person's assets or income violative of due process while the deprivation of his life is not?—particularly when the

²¹The \$1.6 million punitive damage award upheld in *Bankers Life* was less than one percent of the defendant's net worth. The \$3.5 million punitive damage award the Supreme Court let stand in *Allstate Ins. Co. v. Hawkins*, in the same term, was only 1/25th of 1% of the defendant's reported assets. In *Browning-Ferris*, the punitive award amounted to .6% of the defendant's net worth and 5% of its net annual income. The punitive award in *Metro-media v. April Enterprises*, let stand last term, was one-half of 1% of the defendant's net worth and one week of net income.

former is the subject of trial court and appellate review and the latter is not.²²

V

THE REASONS WHICH LED TO THE *McGAUTHA* RULING APPLY HERE WITH GREATER FORCE—i.e., A MECHANISTIC APPROACH TO SENTENCING, WHICH IS INCAPABLE OF APPLYING REASONED DISCRETION TO INDIVIDUAL CIRCUMSTANCES, IS NO FRIEND OF DUE PROCESS.

Punitive damage juries are told to consider the nature and purpose of punitive damages, i.e., punishment, example and deterrence, and to fashion an award by considering the reprehensibility of the conduct found to be malicious, fraudulent or oppressive, the net worth of the defendant, and a reasonable relationship to the compensatory damages.

In the California case reviewed in *McGautha*, the jury was instructed:

"Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury."

²²More protective procedures are required if the action is criminal rather than civil, or if the interest involved is life or liberty, rather than property. See *Parratt v. Taylor*, 451 U.S. 527 (1981).

"This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Cruzan v. Director, Missouri Dept. of Health*, ___ U.S. ___, No. 88-1503 (June 25, 1990) (quoting *Santosky v. Kramer*, 495 U.S. 745, 756 (1982)).

In the Ohio case, the jury was simply given no instruction at all in this regard. The instruction approved in *Andres v. United States*, 333 U.S. 740, 68 S.Ct. 880, 92 L.Ed. 1055 (1948) provided:

"This power [to recommend mercy] is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.' *Id.* at 743, n. 4, 68 S.Ct. at 882."

In holding that this admittedly standardless jury discretion to determine the severity of a criminal penalty was not violative of due process, the majority reasoned as follows:

"Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."

"[However (quoting from the Royal Commission on Capital Punishment)], it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed and weighed against each other when they are presented in a concrete case."

* * *

"For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of

circumstances would ever be really complete."²³

In light of the various devices suggested by Petitioner and its amici for restraining punitive awards, the following observation from *McGautha* is particularly cogent:

"To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment."

VI

PETITIONER DANGEROUSLY BLENDS THIS COURT'S FUNCTION WITH RESPECT TO INTERPRETING FEDERAL STATUTES WITH ITS ROLE IN DETERMINING THE CONSTITUTIONALITY OF STATE STATUTES.

Petitioner's attempt to appeal to this Court as a Superlegislature, dictating policy to the states, is no better illustrated than in its blending of principles of statutory construction with those of constitutional review. It argues as follows:

²³It is this very reasoning process which is attacked by Petitioner and found to be violative of Due Process. At page 7 of Petitioner's Brief, it attempts to demonstrate the lack of Due Process in Alabama's punitive damage system by quoting from *Central Alabama Elec. Corp. v. Tapley*, 546 So.2d 371 (Ala. 1989): "We can envision no set of carved-in-granite standards that would guide every jury in every conceivable case." Far from being a violation of Due Process, such sentiments echo those of the majority in *McGautha*. Indeed, seven years ago, Justice O'Connor joined the dissent of Chief Justice Burger, in which it was argued that the application of a proportionality analysis under the Eighth Amendment to all criminal sanctions would lead to rulings that either would be essentially arbitrary or would call for "Solomonic wisdom." *Solem v. Helm*, 463 U.S. 277, 305, 314 (1983).

"In *Electrical Workers v. Foust*, 442 U.S. 42 (1979), this Court banned punitive damages in union representation cases, noting, at page 50, that 'the impact of these windfall recoveries is unpredictable and potentially substantial.'"

* * *

"In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court banned punitive damages in suits against municipal corporations in 42 U.S.C. § 1983 actions.

"In *Smith v. Wade*, 461 U.S. 30 (1983), cogent objections to punitive damages generally were set forth (Rehnquist, J., dissenting).

"The concerns regarding punitive damages expressed in the above cases are, it is submitted, Due Process concerns, applicable here." (Brief of Petitioner, at 8-19.)

In *Foust*, the Court interpreted the Railway Labor Act as not providing for punitive damages, while in *Fact Concerts* and *Smith v. Wade*, the Court construed the Civil Rights Act of 1871 to allow for punitive damages generally, but not against municipalities.

In his dissent in *Smith v. Wade*, Justice Rehnquist clearly identified the "concerns" at issue—and they were not "due process concerns":

"... a forthright inquiry into the intent of the 42d Congress and a balanced consideration of the public policies" (461 U.S. at 56; 103 S.Ct. 15 1640.)

Nowhere in Justice Rehnquist's dissenting opinion is there the slightest hint that the Due Process Clause precludes the states from conducting their own "balanced consideration of public policies."

According to Petitioner's distorted view of Federalism, this Court's interpretation of the intent of Congress with respect to a punitive damage remedy in the Railway Labor and Civil

Rights Acts becomes the measure of what the states are constitutionally permitted to accomplish under the Due Process Clause.

By equating this Court's "statutory interpretation" function with its "constitutional review" function, Petitioner wholly deprives the States of their role in the federal system.

Justice Rehnquist's dissent in *Smith v. Wade*, while critical of punitive damages as a matter of federal policy in section 1983 actions, was far from a harbinger of any constitutional restrictions on the states' right to maintain their own, long-established punitive damage systems. Indeed, an acute sensitivity to federalism concerns fueled Justice Rehnquist's dissent:

"When federal courts enforce punitive damages awards against local officials they intrude into sensitive areas of sovereignty of coordinate branches of our Nation, thus implicating the most basic values of our system of federalism." (461 U.S. at 92; 103 S.Ct. 1654.)

VII

PETITIONER'S EXPANSIVE VIEW OF SUBSTANTIVE DUE PROCESS MAKES THE CONSTITUTIONALIZATION OF STATE COMPENSATORY DAMAGE SYSTEMS INESCAPABLE

Petitioner states its Due Process challenge to state punitive damage awards as follows:

"Standardless Jury Discretion. Alabama law for determining the amount of punitive damages, and the jury instruction in this case authorized thereunder, are impermissibly vague and incomprehensible, and therefore void under the Due Process Clause of the Fourteenth Amendment, because they contain no standard for determining the amount to be awarded." (Brief of Petitioner at 9.)

If this theory is adopted, then not only state punitive damage

and criminal sentencing²⁴ systems must be constitutionalized but state compensatory damage systems as well.

Compensatory awards for general damages in a personal injury action are proportional only to "a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy" and for which "no method is available to the jury by which it can objectively evaluate such damages." *Beagle v. Vasold*, 65 Cal.2d 166 (1966). On appeal, a "shock the conscience" standard is employed. *Bertero v. National General Corp.*, 13 Cal.3d 43, 61, 118 Cal.Rptr. 184 (1974).

As compensatory awards are "open-ended" and subject to substantially less proportionality and less standards than punitive awards, are all of the States depriving tortfeasors of procedural and substantive Due Process? A merely inadvertent automobile driver or a faultless product manufacturer, who renders another quadriplegic, and stands to lose 100% (not just 1/2 of 1%) of his assets, is surely entitled to at least as much due process protection against "open-ended" and "standardless" awards.

²⁴ A myriad of state laws typically set a very wide range of punishment for a given offense and give judges almost unreviewable discretion in fixing sentences—laws which have been held not to violate due process. See *Garcia v. United States*, 769 F.2d 697, 699, n.1 (11th Cir. 1985). As this Court has noted in *dicta*, "legislatures [are] free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion). See *Stevens v. Armontrout*, 787 F.2d 1282, 1284 (8th Cir. 1986) [upholding against due process challenge a 200-year bench sentence under a statute that permitted sentence between ten years and "any number of years"]. In *McMillan v. Pennsylvania*, 106 S.Ct. 2411, 2420 (1986), the Court rejected a due process challenge to a statute that prescribed a preponderance of the evidence standard for determining facts relating to sentencing, noting that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." Even in capital sentencing, the constitutional limits are based on the Eighth Amendment and not the Due Process Clause. See *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Lockett*, *supra*.

Petitioner and its amici seek to have this Court set an "outer limit" on punitive damage awards. Just as nine state legislatures have seen fit to do so, many states, as well as Congress, have set "outer limits" on various categories of compensatory awards.²⁵ If substantive due process principles mandate an "outer limit" on punitive awards (regardless of the heinousness of the defendant's conduct, its assets, or the amount of compensatory damages), then would these same principles serve to "constitutionalize"²⁶ the even greater "standardless discretion" afforded juries in assessing compensatory damages? Is there a rational—let alone a constitutional—distinction?

CONCLUSION

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The power reserved to the

²⁵ See, e.g., *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978) [upholding statutory limit on liability in the event of a nuclear accident]; *Johnson v. St. Vincent Hospital Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980); and *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665 (1985) [upholding limitation on compensatory damages in medical malpractice cases]; the Warsaw Convention, 49 Stat., Part II, 3000, Treaty Series No. 876 [limiting personal injury and death damages in international airplane crash litigation]; Speiser, *Recovery for Wrongful Death* (2d ed. 1975), The Lawyers Cooperative Publishing Co., Ch. 7, "Limitations On Death Damages"; and various state "no-fault" automobile liability systems (42 A.L.R.3d 229).

²⁶ *New York Times Co. v. Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander." *Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.*, 105 S.Ct. 2939, 2949, 472 U.S. 749, 766, 86 L.Ed.2d 593 (1985) (Justice White, concurring).

several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *"The Federalist Papers"* No. 45 (James Madison).

"None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom." Benjamin N. Cardozo, *The Storrs Lectures*, delivered at Yale University, Lecture III, from *"The Nature of the Judicial Process,"* Yale University Press, 1921, at 115.

Respectfully, the judgment of the State Supreme Court should be affirmed.

Respectfully submitted,

HURLEY, GRASSINI & WRINKLE
A Law Corporation

By: ROLAND WRINKLE

Attorneys for Amicus Curiae
California Trial Lawyers Association

APPENDIX A

TRIAL AND REVIEWING COURT ACTION ON PUNITIVE AWARDS (1922 — 1986)

<i>Morris v. Standard Oil Co.</i> 188 Cal. 468 (1922)	\$ 25,000	Remanded for new trial re damages; excessive.
<i>Wilkinson v. Singh</i> 93 Cal.App. 337 (1928)	1,500	Remanded for new trial unless remitting of \$300 accepted.
<i>Livesey v. Stock</i> 208 Cal. 315 (1929)	50,000	New trial ordered unless remitting for \$10,000.
<i>Booth v. Peoples Finance etc. Co.</i> 124 Cal.App. 131 (1932)	1,500	Remanded for new trial unless remitting for \$500.
<i>Washer v. Bank of America</i> 87 Cal.App.2d 501 (1948)	80,000	Reversed by trial judge on JNOV; affirmed.
<i>Finney v. Lockhart</i> 35 Cal.2d 161 (1950)	2,000	Affirmed.

<i>Luke v. Mercantile Acceptance Corp.</i> 111 Cal.App.2d 431 (1952)	2,500	Retrial ordered on issue of punitive damages.
<i>Larrick v. Gilloon</i> 176 Cal.App.2d 408 (1959)	10,000	Upheld.
<i>DiGiorgio Fruit Corp. v. AFL-CIO</i> 215 Cal.App.2d 560 (1963)	50,000	Upheld.
<i>Toole v. Richardson-Merrell, Inc.</i> 251 Cal.App.2d 689 (1967)	500,000	New trial ordered unless remitted to \$250,000.
<i>Oakes v. McCarthy Co.</i> 267 Cal.App.2d 231 (1968)	77,500	Trial judge reduced to \$59,300; affirmed.
<i>Cunningham v. Simpson</i> 1 Cal.3d 301 (1969)	25,000 Unsegregated	Unsegregated damages excessive; remanded for new trial.
<i>Ferraro v. Pacific Fin. Corp.</i> 8 Cal.App.3d 339 (1970)	33,000	Affirmed.

<i>Fletcher v. Western Nat'l Life Ins. Co.</i> 10 Cal.App.3d 376 (1970)	640,000	Reduced to \$180,000.
<i>Wetherbee v. United Ins. Co.</i> 18 Cal.App.3d 266 (1971)	500,000	Reduced to \$200,000.
<i>Forte v. Nolfi</i> 25 Cal.App.3d 656 (1972)	Unsegregated Damages	Remanded on issue of damages; \$20,000 punitives excessive.
<i>Field Research Corp. v. Patrick</i> 30 Cal.App.3d 603 (1973)	150,000	Upheld.
<i>Schroeder v. Auto Driveaway Co.</i> 11 Cal.3d 908 (1974)	10,000	Upheld.
<i>Bertero v. National Gen. Corp.</i> 13 Cal.3d 43 (1974)	625,000	Affirmed as proper.

<i>Roemer v. Retail Credit Co.</i> 44 Cal.App.3d 926 (1975)	250,000	Affirmed.	
<i>Farmy v. College Housing, Inc.</i> 48 Cal.App.3d 166 (1975)	45,000	Trial court reversed damages; insufficient evidence for punitive.	
<i>Beck v. State Farm Mut. Auto. Ins. Co.</i> 54 Cal.App.3d 347 (1976)	75,000	Trial judge denied JNOV; appellate court modified to strike all punitives.	
<i>Allard v. Church of Scientology</i> 58 Cal.App.439 (1976)	250,000	Reduced by appellate court to \$50,000.	- A 4 -
<i>Weisenburg v. Molina</i> 58 Cal.App.3d 478 (1976)	28,240	Affirmed.	
<i>Merlo v. Standard Life & Acc. Ins. Co.</i> 59 Cal.App.3d 5 (1976)	500,000	Reversed as excessive.	

<i>Zhadan v. Downtown L.A. Motors</i> 66 Cal.App.3d 481 (1976)	175,000 first trial	Trial judge ordered new trial unless remitted to \$50,000; plaintiff did not remit. (App. ct. affirmed trial judge.)	
<i>Little v. Suyvesant Life Ins. Co.</i> 67 Cal.App.3d 451 (1977)	2,500,000	Appellate court remanded for new trial unless reduced to \$250,000.	
<i>Henderson v. Security Nat'l Bank</i> 72 Cal.App.3d 764 (1977)	125,000	Reversed punitive award due to insufficient evidence; affirmed.	- A 5 -
<i>Neal v. Farmers Ins. Exch.</i> 21 Cal.3d 910 (1978)	1,518,637	Reduced to \$740,000.	
<i>Walker v. Signal Companies, Inc.</i> 84 Cal.App.3d 982(1978)	215,000	Affirmed.	
<i>Grimshaw v. Ford Motor Co.</i> 119 Cal.App.3d 757 (1981)	125,000,000	Reduced by trial court to \$3.5 million; affirmed.	

<i>Egan v. Mutual of Omaha</i> 24 Cal.3d 809 (1979)	5,000,000	Reversed as excessive.
<i>Agarwal v. Johnson</i> 25 Cal.3d 932 (1979)	47,000	Affirmed.
<i>Bindrim v. Mitchell</i> 92 Cal.App.3d 61 (1979)	25,000	Affirmed.
<i>Delos v. Farmers Ins. Group Inc.</i> 93 Cal.App.3d 642 (1979)	4,000,000	Trial Court ordered new trial unless remitted to \$350,000; affirmed on appeal.
<i>Zhadan v. Downtown L.A. Motors</i> 100 Cal.App.3d 821 (1979)	90,000 second trial	Damages in second trial affirmed on appeal
<i>Miller v. Elite Ins. Co.</i> 100 Cal.App.3d 739 (1980)	150,000	Affirmed.

<i>Rosener v. Sears, Roebuck & Co.</i> 110 Cal.App.3d 740 (1980), appeal dismissed 450 U.S. 1051 (1981)	10,000,000	Remanded for new trial unless remitted for \$2.5 million.
<i>Schomer v. Smidt</i> 113 Cal.App.3d 828 (1980)	16,000	Affirmed.
<i>Pistorius v. Prudential Ins. Co.</i>	1,000,000	Affirmed.
<i>Chodos v. Insurance Co. of North America</i> 126 Cal.App.3d 86 (1981)	200,000	Affirmed.
<i>Godfrey v. Steinpress</i> 128 Cal.App.3d 154 (1982)	60,000	Affirmed.
<i>Austero v. Washington National Ins. Co.</i> 132 Cal.App.3d 408 (1982)	200,000	Affirmed.

<i>Burnett v. National Enquirer, Inc.</i> 144 Cal.App.3d 991 (1983)	1,300,000	Trial court remitted to \$750,000. Appellate court remanded for new trial unless remitted to \$150,000.
<i>Vossler v. Richards Mfg. Co.</i> 143 Cal.App.3d 952 (1983)	500,000	Affirmed.
<i>Krusi v. Bear Stearns & Co.</i> 144 Cal.App.3d 664 (1983)	50,000	Remanded.
<i>Seaman's Direct Buying Service Inc. v. Standard Oil Co.</i> 36 Cal.3d 752 (1984)	11,000,000	Trial judge ordered new trial unless remitted to \$7 million; underlying judgments reversed by appellate court for retrial.
<i>Moore v. American United Life Ins. Co.</i> 150 Cal.App.3d 610 (1984)	2,500,000	Affirmed.

- A 8 -

<i>Betts v. Allstate Ins. Co.</i> 154 Cal.App.3d 688 (1984)	3,000,000	Affirmed.
<i>Devlin v. Keaney Mesa AMC/Jeep/Renault, Inc.</i> 155 Cal.App.3d 381 (1984)	80,000	Affirmed.
<i>Fleming v. Safeco Ins. Co.</i> 160 Cal.App.3d 31 (1984)	116,000	Affirmed.
<i>Goshgarian v. George</i> 161 Cal.App.3d 1214 (1984)	15,000	Vacated by appellate court unless remitted to \$7,500.
<i>Sanchez-Corea v. Bank of America</i> 38 Cal.3d 892 (1985)	1,000,000	Trial judge ordered new trial; Supreme Court reversed order.
<i>Sprague v. Equifax Inc.</i> 166 Cal.App.3d 1012 (1985)	5,000,000	Trial judge ordered new trial unless remitted to \$1 million; appellate court affirmed trial judge.

- A 9 -

<i>Jahn v. Brickey</i> 168 Cal.App.3d 399 (1985)	250,000	Trial judge ordered new trial unless remitted to \$100,000; appellate court affirmed trial court.
<i>Wayte v. Rollins Int'l, Inc.</i> 169 Cal.App.3d 1 (1985)	1,500,000	Remitted to \$308,000.
<i>Frazier v. Metropolitan Life Ins. Co.</i> 169 Cal.App.3d 90 (1985)	8,000,000	Trial court remitted to \$2 million; appellate court vacated entirely.
<i>Greenfield v. Spectrum Inv. Corp.</i> 174 Cal.App.3d 111 (1985)	442,500	Trial judge ordered new trial unless remitted to \$215,000; appellate court reinstated judgment because of failure to state reasons for new trial.
<i>California Shoppers, Inc. v. Royal Globe Ins. Co.</i> 175 Cal.App.3d 1 (1985)	2,000,000	JNOV granted by trial judge; affirmed by appellate court.

<i>Troensegaard v. Silvercrest Ind. Inc.</i> 175 Cal.App.3d 218 (1985)	55,000	Punitive damages vacated.
<i>Ball v. Posey</i> 176 Cal.App.3d 1209 (1986)	40,000	Affirmed.
<i>Ramona Manor Convalescent Hosp. v. Care Enterprises</i> 177 Cal.App.3d 1120 (1986)	2,500,000	Reversed for retrial.
<i>Pusateri v. E.F. Hutton & Co., Inc.</i> 180 Cal.App.3d 247 (1986)	160,000	Affirmed.
<i>Campbell v. McClure</i> 182 Cal.App.3d 806 (1986)	100,000	Affirmed
<i>Duggan v. Hasso</i> 185 Cal.App.3d 1184 (1986)	1,100,000	Reversed for trial.

<i>Flyer's Body Shop Profit Sharing Plan v. Tigor Title Ins. Co.</i> 185 Cal.App.3d 1149 (1986)	250,000	Vacated on appeal.
<i>Travelers Ins. Co. v. Leshner</i> 187 Cal.App.3d 169 (1986)	1,500,000	Vacated on appeal.
<i>Hobbs v. Eichler</i> 164 Cal.App.3d 174 (1985)	220,000	Affirmed.
<i>Horn v. Guaranty Chevrolet</i> 270 Cal.App.2d 447 (1969)	15,000	Affirmed.
<i>MacDonald v. Joslyn</i> 275 Cal.App.2d 282 (1969)	50,000	Affirmed.
<i>Anglo-American Gen'l v. Jackson Life Ins. Co.</i> 83 F.R.D. 41, applying Calif. law (1979)	100,000	Remitted by trial court \$5,000.

Supreme Court, U.S.
FILED

JUL 13 1990

JOSEPH F. SPANIOLO, JR.
CLERK

(32)
No. 89-1279

In the
Supreme Court of the United States
October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
vs.

CLEOPATRA HASLIP, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

**BRIEF OF
TRIAL LAWYERS FOR PUBLIC JUSTICE
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

Priscilla Budeiri
TRIAL LAWYERS FOR
PUBLIC JUSTICE
Suite 100
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-8600

Michael V. Ciresi*
Roberta B. Walburn
ROBINS, KAPLAN, MILLER
& CIRESI
1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-8500

Attorneys for
TRIAL LAWYERS FOR PUBLIC JUSTICE

*Counsel of Record
July 13, 1990

BEST AVAILABLE COPY

28

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE DOCTRINE OF PUNITIVE DAMAGES IS ROOTED DEEP IN THE HERITAGE OF THE LAW	4
A. Punitive Damages Date Back to Ancient Cultures And Early English Law	4
B. Punitive Damages Were Well Established in Early American Law	5
II. THE ATTACK ON PUNITIVE DAMAGES IS UNFOUNDED	7
A. Punitive Damages Have Long Been Attacked, Without Basis, as Routine and Excessive	7
B. Empirical Evidence Does Not Support the Current Attacks on Punitive Damages	9
1. American Bar Foundation	12
2. RAND	14
3. General Accounting Office	18
4. Landes and Posner	19
III. THE DISTINGUISHING FEATURE OF THE CURRENT ERA OF CONTROVERSY IS THE ASCENDANCY OF THE ADVERSARIES OF PUNITIVE DAMAGES	20
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
<i>Alcorn v. Mitchell</i> , 63 Ill. 553 (1872)	6
<i>Barry v. Edmunds</i> , 116 U.S. 550 (1885)	7
<i>Browning-Ferris Industries v. Kelco Disposal, Inc.</i> , 452 U.S. —, 109 S.Ct. 2909 (1989)	4, 5
<i>Coryell v. Colbaugh</i> , 1 N.J.L. 90 (N.J. 1791)	6
<i>Day v. Woodworth</i> , 54 U.S. (13 How.) 363 (1851)	6
<i>Fischer v. Johns-Manville Corp.</i> , 472 A.2d 377 (N.J.Super. 1984), <i>aff'd</i> , 512 A.2d 466 (N.J. 1986)	21, 22
<i>Genay v. Norris</i> , 1 S.C.L. (1 Bay.) 6 (1784)	6
<i>Huckle v. Money</i> , 2 Wils. 206, 95 Eng.Rep. 768 (K.B. 1763)	5
<i>Scott v. Donald</i> , 165 U.S. 58 (1896)	7
<i>Smith v. Wade</i> , 461 U.S. 30 (1983)	7
<i>Southern Kansas Railway v. Rice</i> , 38 Kan. 398 (1888)	6
<i>Wilkes v. Wood</i> , Lofft 1, 98 Eng.Rep. 489 (K.B. 1763)	5
 Other Authorities:	
Blalock, <i>Social Statistics</i> (2d ed. 1972)	12
Brodeur, <i>Outrageous Misconduct: The Asbestos Industry on Trial</i> (1985)	21, 22
Daniels, <i>Punitive Damages: The Real Story</i> , ABA Journal 60 (Aug. 1, 1986)	10
Daniels and Martin, <i>Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards</i> , American Foundation Working Paper #8705 (1988)	passim

Daniels and Martin, <i>Myth and Reality in Punitive Damages</i> , American Bar Foundation Working Paper #8911 (1990).....	passim
Ellis, <i>Fairness and Efficiency in the Law of Punitive Damages</i> , 56 So. Cal. L. Rev. 1 (1982).....	5
Forbes, Jan. 8, 1990 at 180	21
General Accounting Office, <i>Product Liability: Verdicts and Case Resolution in Five States</i> (1989)	18, 19
Ghiardi and Kircher, <i>Punitive Damages Law and Practice</i> (1985).....	7, 8
Henderson and Eisenberg, <i>The Quiet Revolution in Products Liability: An Empirical Study of Legal Change</i> , 37 UCLA L. Rev. 479 (1990)	17
Holmes, <i>The Common Law</i> (1881).....	3
Landes and Posner, <i>New Light on Punitive Damages</i> , 10 Reg. 33 (Sept./Oct. 1986)	19
McCormick, <i>Some Phases of the Doctrine of Exemplary Damages</i> , 8 N.C.L. Rev. 129 (1930)	8, 9
Morris, <i>Punitive Damages in Tort Cases</i> , 44 Harv. L. Rev. 1173 (1931)	4, 9
Note, <i>Exemplary Damages in the Law of Torts</i> , 70 Harv. L. Rev. 517 (1957)	7
Owen, <i>Punitive Damages in Products Liability Litigation</i> , 74 Mich. L. Rev. 1257 (1976)	4
Peterson, Sharma & Shanley, <i>Punitive Damages: Empirical Findings</i> (RAND R-3311-ICJ) (1987)	passim
Texas State Board of Insurance, <i>Texas Liability Insurance Closed Claim Survey</i> (1987).....	19
The Washington Post, March 14, 1990, at 16	21

Willis, <i>Measure of Damages When Property is Wrongfully Taken by a Private Individual</i> , 22 Harv.L.Rev. 419 (1909)	8
--	---

INTEREST OF AMICUS CURIAE

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm devoted to representing victims of corporate and government abuse. TLPJ has pioneered cases in environmental protection, civil liberties, consumer safety and employee protection. Supported by more than 750 trial lawyers throughout the United States, TLPJ is the only public interest law firm in the nation dedicated to using plaintiffs' tort law and trial law for the public good.

TLPJ strives to achieve social change and vindicate individual rights by ensuring that wrongdoers are punished for their misconduct. Most emphatically, punitive damages are a vital weapon in TLPJ's campaign for justice. Accordingly, TLPJ respectfully submits this brief in support of respondents in this case.¹

¹ Pursuant to Rule 37 of the Rules of this Court, TLPJ has obtained the consent of the parties to the filing of this brief. The parties' letters of consent have been filed with the Clerk of Court.

SUMMARY OF ARGUMENT

Punitive damages are rooted deep in the heritage of the law. Indeed, the beginnings of the doctrine trace far back in antiquity to the earliest known legal code. From the Babylonians, through the ancient Hittites and Hebrews and Hindus, through the early Romans, the concept of punitive damages began to develop. In England, statutes provided for multiple damages by the thirteenth century, and common law recognized exemplary damages by the eighteenth century. In the United States, the practice of awarding such damages was solidly grounded by pre-Revolutionary days. By the 1800s, this Court was already proclaiming the law of punitive damages to be "well established" and "well settled."

Not that the doctrine was without criticism throughout its developing years. This is not surprising since punitive damages often represent the sole means by which powerful interests in society may be held accountable. For years, for decades, in some instances for a century or more, the foes of punitive damages have assailed the doctrine. Indeed, virtually all of the present day condemnations of punitive damages are well worn.

Yet today we are assaulted with assertions that the debate is different because, it is claimed, awards of punitive damages are "routine" and "skyrocketing." Even this contention is not new to the debate — nor is it true. The attack on punitive damages is politicized and well financed. But it is not backed by empirical evidence. There are only two major studies which even attempt to quantify the incidence and amounts of punitive damage awards in any comprehensive manner. Neither of these studies supports the extreme rhetoric of the debate. One of the studies is repeatedly miscited. Incredibly, the other study — which examines a greater number and more diverse jurisdictions — is not even cited in the twenty-five extensive briefs filed by or in support of the petitioner in this case.

The long tradition of punitive damages, extending through centuries of history and persevering through periodic attacks of criticisms, is a testament to the

underlying soundness, and indeed necessity, of the doctrine in our system of jurisprudence. This is a doctrine founded upon the highest of moral principles and the most basic of human sentiments. As Oliver Wendell Holmes wrote:

[T]he various forms of liability known to modern law spring from the common ground of revenge [I]n the criminal law and the law of torts it is of the first importance. It shows that they have started from a moral basis, from the thought that some one was to blame.

O.W. Holmes, *The Common Law* 37 (1881).

Through punitive damages, juries are empowered as a responsible voice of societal ethics. The rights of the poor and vulnerable are vindicated, and acts of willful and outrageous misconduct are punished and deterred. In short, grievous wrongs may be righted.

ARGUMENT

I. THE DOCTRINE OF PUNITIVE DAMAGES IS ROOTED DEEP IN THE HERITAGE OF THE LAW

A. Punitive Damages Date Back to Ancient Cultures and Early English Law

The concepts underlying the doctrine of punitive damages are as old as the law itself. Indeed, one commentator has characterized the historical foundation for the doctrine as nothing short of "astounding."

Once it is recognized that multiple damages are merely one statutory form of punitive damages, the depth of the historical foundation underlying punitive damages becomes astounding. Multiple damages were provided for in Babylonian law nearly 4000 years ago in the Code of Hammurabi, the earliest known legal code.... They were provided for in the Hittite Laws of about 1400 B.C.,... and in the Hebrew Covenant Code of Mosaic law of about 1200 B.C.... The Hindu Code of Manu of about 200 B.C. also provided for multiple damages in at least one case.... The very basis of early Roman civil law, beginning with the Twelve Tables of 450 B.C., was punitive in nature..., and several provisions in classical Roman law prescribed double, treble, and quadruple damages....

Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich.L.Rev. 1257, 1262-63 n. 17 (1976).

In England, the first statutory provision for multiple damages appears to date back to 1275. *Id.*, at 1263 n. 18; see also *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 452 U.S. ___, 109 S.Ct. 2909, 2919-20 (1989). Some commentators believe that in practice English juries were awarding punitive damages under common law principles well before the eighteenth century. See Owen, *supra*, at 1263 n. 19; Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1176 n. 4 (1931). In any event, by 1763 English case

law explicitly recognized "exemplary damages" in two related decisions involving actions for trespass and imprisonment. *Huckle v. Money*, 2 Wils. 206, 95 Eng.Rep. 768 (K.B. 1763); *Wilkes v. Wood*, Lofft. 1, 98 Eng.Rep. 489 (K.B. 1763).

In *Wilkes*, the court set forth the policy underlying exemplary damages in much the same terms as used today:

Damages are designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceeding for the future and as a proof of the detestation of the jury to the action itself.

98 Eng.Rep. at 498-99.

In this early era in England, exemplary damages were awarded in a wide range of cases, including slander, seduction, assault and battery, malicious prosecution, trespass and false imprisonment. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So.Cal.L.Rev. 1, 14-15 (1982). Yet a common thread tied together these diverse cases: the honor and dignity of the victim had been offended. As Ellis stated:

Honor may be less highly esteemed in contemporary western society, but it was of compelling importance in the status-oriented society that typified England well into the nineteenth century.

Id. at 15.

B. Punitive Damages Were Well Established in Early American Law

From English roots, the doctrine of punitive damages was quickly transplanted to American law in pre-Revolutionary days. *Browning-Ferris*, 109 S.Ct. at 2919. As this Court stated in *Browning-Ferris*:

[T]he practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment.

Id. (emphasis added).

As in early English decisions, the early American cases arose in diverse situations, with the common bond of an affront to the honor and dignity of the victim. Thus, one of the first punitive damages cases in the United States was an action for breach of a promise to marry. *Coryell v. Colbaugh*, 1 N.J.L. 90 (N.J. 1791). In other early cases, punitive damages were awarded for adding a large quantity of a potion to a glass of wine in a "drunken frolic," *Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (1784), for a spit in the face, *Alcorn v. Mitchell*, 63 Ill. 553 (1872) (\$1,000 awarded), and for attempting to eject a rightfully-seated passenger from a train. *Southern Kansas Railway v. Rice*, 38 Kan. 398 (1888).

By 1851, when this Court first endorsed the doctrine, these damages — called punitive, exemplary, vindictive or smart money — were already "well established" in certain actions. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). In fact, this Court noted in *Day* that while the propriety of the doctrine has been questioned by some, "if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." *Id.* (emphasis added). The Court continued:

By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

Id. (emphasis added).²

In 1885, this Court reiterated that the doctrine of exemplary damages was "settled law." *Barry v. Edmunds*, 116 U.S. 550, 562 (1885). So settled was the law, and so voluminous the precedents, that after citing numerous cases, the Court stated:

It is unnecessary . . . further to multiply authorities on this point. The precedents are indefinite in number, and the application of the rule as uniform as the circumstances of the cases are various.

Id. at 565.

Again, in 1896, this Court repeated that the doctrine was "well settled" in certain cases. *Scott v. Donald*, 165 U.S. 58, 78 (1896). In fact, by this time the doctrine was also "settled law by nearly all state and federal courts." *Smith v. Wade*, 461 U.S. 30, 35 (1983).

II. THE ATTACK ON PUNITIVE DAMAGES IS UNFOUNDED

A. Punitive Damages Have Long Been Attacked, Without Basis, As Routine and Excessive

The current attack on punitive damages is premised in large part on assertions that a literal explosion of such awards mandates new scrutiny of this old doctrine. Yet virtually all of the legal arguments advanced in the present case were raised long ago. Even assertions of routine and excessive verdicts are at least decades old.

In many respects, the fierce attack on punitive damages — yesterday and today — is not surprising. By the mid-1800s, the use of punitive damages began to shift away from compensation for offended honor to emphasize punishment and deterrence. Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L.Rev. 517, 519-20 (1957); see also Ghiardi

²In a note accompanying the decision, citations are listed for scores of punitive damages cases involving trespass, seduction, fraud, patents, marine torts, assault and battery, false imprisonment, killing animals and obstructing a public highway.

and Kircher, *Punitive Damages Law and Practice*, § 1.03 (1985). Society was changing. Traditional concepts of honor and dignity became less preeminent in our culture. Large industrial and commercial entities began to command power on a national level, and a limited number of them abused that power. These powerful business interests began to be held accountable by juries, one element of society free from their political and economic influence.

And so, the modern era of scathing attacks on punitive damages commenced. By the early years of this century one commentator who questioned the propriety of the doctrine was already writing:

This question has been so often discussed that it is becoming somewhat threadbare

Willis, *Measure of Damages When Property Is Wrongfully Taken by a Private Individual*, 22 Harv.L.Rev. 419, 420 (1909). The author of this article proceeded to outline his criticisms, which mirrored many of the critiques offered today, including the lack of a "maximum penalty" to constrain juries. *Id.* at 421.

Similarly, in a 1930 article, Dean McCormick protested that exemplary damages "are limited only by the caprice of the jurors" and "that this want of a guiding measure leads to excess and injustice." McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C.L.Rev. 129, 130 (1930). As a result, McCormick complained, "The reported cases offer many interesting instances of startling large verdicts for punitive damages" *Id.* at 149 (emphasis added).³ McCormick also commented on the frequency of punitive damage verdicts, asserting that such awards were given "constantly" and "often" and were, indeed,

³The article cited three verdicts as support for this statement: (1) a \$50,000 verdict "seemingly" including both compensatory and punitive damages, (2) a verdict for \$750 in actual and \$33,333.33 in punitive damages, with the punitive award reduced to \$10,000, and (3) a verdict for \$318 in actual and \$12,650 in punitive damages, reduced by \$5,000.

"numberless." *Id.* at 136-138.⁴

At least one other author in McCormick's era also speculated — in 1931 — that punitive damages were being awarded for "inadvisedly large sums." Morris, *supra*, at 1179. This author, however, was unusually forthright in admitting that this appraisal was merely "hypothesis":

[T]his criticism is based on hypothesis, and its value depends on the facts.

Id.

However, the facts simply did not exist at that time. Nor can the facts from decades long past be reconstructed. Systematic reporting of punitive damage verdicts was nonexistent. Attempting to analyze those verdicts which were recorded fails to present a meaningful appraisal since there is no means to evaluate the verdicts — as large or small or representative — in the context of their time. Attempting to translate recorded verdicts from long ago into present-day dollars further strains the analysis since "constant" dollars cannot bridge the schism of vastly different societies.

In short, controversy and debate have long surrounded awards of punitive damages. But the attacks — yesterday as well as today — have been based on little more than anecdotes and hyperbole.

B. Empirical Evidence Does Not Support the Current Attacks on Punitive Damages

Despite the rhetoric of the attack on punitive damages, the empirical evidence simply does not support assertions that such awards are "routine" or "astronomical" or "mind-boggling" or "skyrocketing." In truth, despite the boldness

⁴In addition, McCormick documented the vast variety of cases in which punitive had already been awarded, including assault, personal injury, false imprisonment, deceit, malicious interference with business relations, trademark infringement, nuisance, pollution of streams, interference with easements, oppressive conduct by common carriers and other public service companies, and even certain categories of contract cases. *Id.* at 136-39.

and certitude of the charges, there is little empirical data to document the incidence and amounts of punitive damage awards. Moreover, the empirical evidence that has been compiled contradicts the extreme rhetoric of the debate.

There are only two major empirical studies of punitive damages: the RAND Institute for Civil Justice ("RAND") study of jury verdicts in Cook County, Illinois and California (primarily San Francisco County),⁵ and the American Bar Foundation ("ABF") study of jury verdicts in 11 states.⁶ (Two much more limited studies, discussed below, are restricted to analyses of product liability cases.)

Of the two major studies, only the RAND study is cited—or, more appropriately, miscited—in the briefs filed by and in support of the petitioner in this case. Lost in the rhetoric is the remarkable finding of the RAND study that punitive damages were awarded by juries in recent years in only 2.5 percent of the trials in Cook County and only 8.3 percent of the trials in San Francisco County. RAND, at 9. Equally striking is that the median punitive damage awards were quite modest: \$43,000 in Cook County and \$63,000 in San Francisco County. RAND, at 15. Quite surprisingly, given the visibility as a target of attack, RAND found that personal injury cases were the least likely type of action to receive punitive damage awards. RAND, at iii.

The ABF study, which is not cited at all in the defense briefs, is more comprehensive than RAND since the data is compiled from a much greater number—and much more diverse—selection of states. Overall, ABF found that in the

⁵Peterson, Sharma & Shanley, *Punitive Damages: Empirical Findings* (RAND R-3311-ICJ) (1987).

⁶Daniels and Martin, *Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards*, American Bar Foundation Working Paper #8705 (1988) ("ABF" 1988"); Daniels and Martin, *Myth and Reality in Punitive Damages*, American Bar Foundation Working Paper #8911 (1990), to be published in 75 Minn.L.Rev. No. 1 (Oct. 1990) ("ABF 1990"). The ABF study was first published as preliminary findings in 1986. Daniels, *Punitive Damages: The Real Story*, ABA Journal 60 (Aug. 1, 1986).

early 1980s only 4.9 percent of jury verdicts included an award of punitive damages. ABF 1990, at 34. Moreover, in the vast majority of jurisdictions, the median punitive damage verdict was less than \$40,000. ABF 1990, at 43.

Given this modest and rather neutral evidence, it is only by manipulation of selected, out-of-context statistics that empirical data is converted into a weapon in a highly politicized debate. Two of the methods used to manipulate—and exaggerate—the data are simple but exceedingly deceptive.

One technique is to focus on percentage increases. When the raw numbers are very small, as with punitive damages awards, even modest increases can be converted to rather dramatic statistics. For example, as noted above, punitive damages were awarded in only 2.5 percent of recent trials in Cook County, according to RAND. This hardly seems cause for alarm. But, because the numbers are so small, this translates into an increase of 2,500 percent from the early 1960s. See RAND, at 9.

A second method of manipulation is to focus on average awards, instead of medians. The average is the total of all awards, divided by the number of cases, "so it can vary greatly with the addition or deletion of one or two very large awards." RAND, at 17. In the punitive damages analysis, the average is a particularly misleading statistic because a small number of aberrational awards greatly skew the average. (These exceptional awards are almost always reduced in post-trial activity). The median, however, is the amount in the middle: smaller than half the awards and larger than the other half. Accordingly, the median is not dramatically affected by a few exceedingly large awards. For this reason, the authors of the ABF study concluded that "as a technical matter the median is more appropriate"

for analysis of punitive damage trends. ABF 1990, at 41.⁷

With this background, the following is a brief review of the empirical studies.

1. *American Bar Foundation*

The American Bar Foundation studied 25,627 jury verdicts in 11 state courts in 47 counties for the years 1981-85.⁸ The states were selected to represent different geographical regions, different size and socio-economic make-ups (including large urban centers, middle-sized cities, suburban areas, industrial, commercial and financial centers and a few agricultural areas) and different legal systems. ABF

⁷ The ABF study quoted from a statistics textbook, as follows:

[T]he mean is affected by changes in extreme values whereas the median will be unaffected unless the value of the middle case is also changed We may say, then, that whenever a distribution is highly skewed, i.e., whenever there are considerably more extreme cases in one direction than the other, the median will generally be more appropriate than the mean.

ABF 1990, at 42, citing, H. Blalock, *Social Statistics* 69-70 (2d ed. 1972).

⁸ The states included in the study were Arizona, California, Colorado, Georgia, Illinois, Kansas, Missouri, New York, Oregon, Texas and Washington.

1988, at 4; ABF 1990, at 33.⁹

Although this is a far more diverse group of jurisdictions than studied by RAND, the authors of the ABF study still cautioned that the study is not a representative sample of all jurisdictions in the country but reflects "a combination of regional balance and available source materials." ABF 1990, at 32.

The ABF study concluded that "the percentage of verdicts which included a punitive damage award was generally quite modest," with punitive damages awarded in 4.9 percent of all money damage jury trials. ABF 1990, at 34. The study stated:

Contrary to the rhetoric of the reformers, punitive damage awards were not routinely awarded during the early 1980s in the sites we examined Equally as important is the finding of substantial variability among the sites, suggesting the futility of assertions about consistent national patterns.

ABF 1990, at 35.

As for the size of verdicts, the ABF study found that in most jurisdictions "the typical (median) punitive damage award is not at a level that is likely to 'boggle the mind.'" ABF 1990, at 43. More specifically:

Fifteen of the twenty sites with more than 10 punitive damage cases during the five year period covered by our data had median punitive damage awards below \$40,000, and all five of the sites with higher medians are in California. Thirteen of the sites had median punitive damage awards below \$30,000. The higher medians for the California sites do suggest, however, that there may be a few places where punitive damage awards are relatively high. Nonetheless, the general pattern is one of low to modest awards.

ABF 1990, at 43. Not only are these amounts not

⁹ One state, Washington, does not provide for punitive damages at common law but has statutory provisions for multiple damages and bad faith damages. ABF 1988, at 4, 9.

"staggering" or "astronomical," to use two terms from the rhetoric of attack, but these are trial verdicts which may be further reduced in post-trial motions.¹⁰

In summary, the ABF report stated:

In general, then, it does not appear from our data that punitive damages are routinely awarded in the sites studies, contrary to what would be expected in light of the rhetoric of crisis and reform. Nor were punitive damages typically given in amounts that would "boggle the mind." Punitive damages were awarded infrequently, and when they were awarded the amount was typically modest. . . . Furthermore, plaintiffs were least likely to be awarded punitive damages in a case involving physical harm — even if that case involved medical malpractice or products liability The description of the punitive damages system presented here is significantly different than the one offered by the reformers, and it is not one that provides evidence of a nationwide problem.

ABF 1990, at 44.

2. RAND

The RAND study examined a database of 24,000 jury trials in Cook County and San Francisco County from 1960 to 1984 and all other California jurisdictions from 1980 to 1984. RAND, at 4. The extremely limited geographical diversity of the study — as well as the relatively small number of punitive damage awards — caution undue generalization. As the RAND report stated:

It is important to emphasize that findings in this report are limited.

The relatively small number of cases resulting in

¹⁰The punitive damage awards in the ABF study reflect jury verdicts and not any post-trial action (i.e. remittitur). All awards are reported in 1985 dollars. ABF 1990, at 43.

punitive damage awards during the past 25 years in both these jurisdictions prohibits sophisticated quantitative analysis.

The report has several important limitations. First, the data describe jurisdictions in only Illinois and California. It is far from certain that their findings apply to other states where laws, legal culture and jurors might differ significantly.

RAND, at ix, 5, 6.

In words that are often quoted in attacks on punitive damages, the RAND report stated that in the major metropolitan areas studied the incidence and amount of punitive damages "increased substantially" from 1960. RAND, at iii. However, as noted above, while the percentage increase may be substantial, the current numbers are still modest.

For example, in the most recent time period studied, 1980 to 1984, punitive damages were awarded in only 2.5 percent of the trials in Cook County and only 8.3 percent in San Francisco County. RAND, at 9. In all California jurisdictions, the incidence of punitive damage awards in the same time period was only 5.1 percent. RAND, at 33. In the entire 24-year period studied, 1960 to 1984, there were only 172 punitive damage awards in Cook County and 149 in San Francisco County. RAND, at 9.

As for the size of awards, RAND found the amounts increasing but concluded that the awards were still "modest." In the period 1980-84, the median punitive damages award was \$43,000 in Cook County and \$63,000 in San Francisco County. RAND, at 15.¹¹ The report stated:

Despite the widespread perception to the contrary, most punitive damage awards are modest. . . .

RAND, at 17.

¹¹ Again, these figures do not account for any post-trial reductions. All amounts are stated in 1984 dollars. RAND, at 14 n. 5.

The perception of "astronomical" or "skyrocketing" awards is actually based on only a few verdicts. As RAND stated:

Most of the total amount of money awarded as punitive damages is awarded in a few cases. Our survey of post-trial activity indicates that these large awards were frequently, but not always, reduced by settlements or judicial action.

RAND, at 65.

Some of the most striking revelations of the RAND study were in the analysis of verdicts by type of case. RAND analyzed punitive damages awards in three different types of cases: business/contract, intentional torts and personal injury.¹² One of the biggest "surprises" cited by RAND was the rarity of punitive damage verdicts in personal injury cases:

In all the jurisdictions studied, personal injury cases, which have received the lion's share of attention in the current debate, were much less likely to result in punitive damage awards than cases involving contract disputes and intentional tort suits, which usually involve violations of civil rights.

RAND, at iii. Indeed, RAND characterized the incidence of punitive damages verdicts in personal injury cases as "quite small." RAND, at v. Punitive damages were awarded in only 1 percent of the personal injury cases in Cook County and only 2 percent of these cases in San Francisco

¹² RAND defined these categories as follows:

The category of business/contract cases involves claims for money damages for fraud, business torts, and unfair business practices. This category also includes certain breaches of contract that have come to be treated as torts because courts regard them as violating an implied covenant to act in good faith. Thus, the category includes bad faith claims against insurance companies, employers, and other businesses. . . . The category for intentional torts includes claims for defamation, discrimination, violations of civil liberties, and assaults. . . . The personal injury category includes negligence and strict liability, but excludes personal injuries from assaults or other intentional torts.

County in the years 1980 to 1984. RAND, at 11. The statistics for product liability cases are even more striking. As RAND stated:

Product liability cases have been of special concern to many critics, but our analyses indicate that punitive damages were awarded in only four product liability cases in San Francisco and two in Cook County from 1960 through 1984.

Rand, at v.

Finally, RAND conducted a limited analysis of post-trial activities, including remittiturs and settlements.¹³ The study concluded:

Because of post-trial actions, the actual impact of punitive damage awards might be somewhat less than suggested by other findings here. Total and average awards have increased in recent years because of the far greater size of the largest awards. But these extraordinary awards are the most likely to be reduced by post-trial activity.

RAND, at ix.¹⁴ Moreover, RAND noted that most of the

¹³ RAND surveyed 129 trials concluded between 1979 and 1983, receiving 68 (53 percent) usable responses. RAND, at 26.

¹⁴ Some opponents of punitive damages contend that high reversal rates of punitive damage verdicts demonstrate that the underlying process is "arbitrary." See, e.g., Amicus Brief of the National Association of Wholesaler-Distributors, et al., at 12. At the same time, others protest that a low reversal rate illustrates that the system does not function as intended. See, e.g., Amicus Brief of The Alabama Defense Lawyers Association, at 9-10. In any event, to the extent that punitive damage awards are reduced or reversed, there are several possible interpretations. The most obvious, of course, is that this documents that the system is working as intended, with trial and appellate courts serving as a check on the jury system. In addition, a penchant by courts to interfere with punitive damages verdicts may indicate a growing conservatism among the judiciary. See Henderson and Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L.Rev. 479 (1990) (documenting a "revolution" in pro-defense decisions in product liability actions).

reductions in awards came not from judicial action but from post-trial settlements. RAND, at 28.

3. General Accounting Office

The General Accounting Office ("GAO") study, published in September 1989, reviewed only a limited number of product liability cases. General Accounting Office, *Product Liability: Verdicts and Case Resolution in Five States* (1989). GAO analyzed 305 product liability trials from 1983 to 1985 in five states: Arizona, Massachusetts, Missouri, North Dakota and South Carolina.

Punitive damages were awarded in 23 of the cases. GAO, at 3. Among the five states, the rate of punitive damages awards varied substantially, as did the size of the awards. GAO, at 29. The punitive damage verdicts ranged from \$500 to \$7 million, for a median award of \$400,000. GAO, at 29. The GAO study concluded:

Consistent with previous research, the incidence and size of punitive damages varied considerably across states. In two states, punitive damage awards were negligible. In contrast, the incidence of such awards in the three other states was high relative to the rate of such awards reported for other jurisdictions. Large punitive damage awards that were disproportionate to compensatory damages occurred in only a few cases.

GAO, at 31.

The GAO study noted that, despite widespread assertions of a crisis, much of the empirical information necessary to assess the tort reform debate may be available only to the insurance industry. GAO suggested that states mandate disclosure of this information:

Our experience in this study confirms that data with which to assess the effects of tort reforms are not readily available. The data contained in courts records or the files of attorneys are neither comprehensive enough to assess reforms' effects nor easily retrieved. In the past, insurers' closed-claims files have proved to be comprehensive. Although such files were unavail-

able to us, state insurance commissioners, as part of their responsibilities for regulating the insurance industry, can require insurers to submit data.

GAO, at 74.¹⁵

4. Landes and Posner

The Landes and Posner study reviewed 359 reported decisions in product liability cases. Landes and Posner, *New Light on Punitive Damages*, 10 Reg. 33 (Sept./Oct. 1986). Punitive damages were allowed in only 2 percent of the cases. Landes and Posner, at 36. (The authors conducted a more limited review of "accident cases" and also found a 2 percent incidence of punitive damage awards, primarily in cases involving aggravating circumstances of gross negligence or recklessness). The study concluded:

The data suggest — though they certainly do not show conclusively — that concern with the incidence of punitive-damage awards may be exaggerated. Other than in cases of intentional wrongdoing, these awards appear to be rare.

Landes and Posner, at 33.

In short, the above studies represent the universe of valid empirical evidence on punitive damages. Other purported "studies" must be viewed with great caution. Much of the rhetoric stems from pseudo studies propounded by advocates in the polemic. Typically, these take the form of nothing more than lists of cases, with a complete absence of information on how the study was conducted or on how the raw numbers translate into meaningful statistics on the incidence or rate of awards. Yet widespread dissemination of these spurious analyses has transformed the discourse on punitive damages.

¹⁵ The Texas State Board of Insurance undertook such a study of claim files in 1987 and found that punitive damages were awarded in only .6 percent of bodily injury claims and .2 percent of medical professional liability claims. Texas Liability Insurance Closed Claim Survey, at 32 (1987). The study further found that punitive damages were considered in the settlement of only 3.3 percent of the claims. *Id.* at 33.

III. THE DISTINGUISHING FEATURE OF THE CURRENT ERA OF CONTROVERSY IS THE ASCENDANCY OF THE ADVERSARIES OF PUNITIVE DAMAGES

In the long tradition of punitive damages, the most striking change in the current era of controversy is not in the amount or frequency of awards, or in the standards upon which the verdicts are based, or in the philosophical foundation of the doctrine. Instead, the distinguishing attribute of this era is the intensity — and success — of the adversaries of punitive damages.

The ABF study described the change as follows:

The debate over punitive damages, and civil justice in general, has changed in an important and troubling way. It became politicized in the 1980s as a part of an intense, well-organized, and well-financed political agenda that seeks fundamental change in the civil justice system Sponsoring and directing the fight are interests which will benefit by the changes sought. In short, the debate over punitive damages has moved from the legal arena to a political one.

The debate over punitive damages (as the debate over civil justice generally) has become more emotional, more manipulative, and less reasoned as a result of the reformers' efforts to develop public awareness and support for their political cause.

ABF 1990, at 10, 12.

That the rhetoric of controversy has become embedded in the national consciousness is a tribute not to the truth but to the power and influence of the well-funded interests seeking to destroy a legal doctrine which exacts accountability for acts of willful misconduct.

For example, in this case the Pharmaceutical Manufacturers Association ("PMA") raises an outcry about "the recent explosion in punitive damage liability" which it claims "is compromising the industry's research efforts."

Amicus Brief of the Pharmaceutical Manufacturers Association and the American Medical Association, at 2. Yet there is no mention in the PMA brief of the empirical evidence that the incidence of punitive damage awards in personal injury actions is, to quote RAND, "quite small." Nor is there mention of the extraordinary profits of the pharmaceutical industry, which rose 18 percent last year and which over the last 10 years have placed the industry as one of the most profitable in the country. *Forbes*, Jan. 8, 1990, at 180.¹⁶ Nor is there mention of the recent boasts of the PMA itself that, contrary to its claims before this Court, the "U.S. Leads in Discovery of 'World Class' Drugs." *The Washington Post*, March 14, 1990, at 16 (PMA advertisement).

Similarly, an amicus brief filed by the asbestos industry assails punitive damages for their role in pushing asbestos producers into bankruptcy. Amicus Brief for the Center for Claims Resolutions. Yet it is exposure to compensatory damages — brought about through decades of outrageous misconduct in willful indifference to the health of millions of Americans — which is largely responsible for the fate of this industry. *Fischer v. Johns-Manville Corp.*, 472 A.2d 377, 586 (N.J. Super. 1984), *aff'd*, 512 A.2d 466 (N.J. 1986); see also P. Brodeur, *Outrageous Misconduct: The Asbestos*

¹⁶The drug companies had a 10-year average return on equity of 20.1 percent, which was the fifth-highest return in the 70 industry groups analyzed. *Id.* at 246.

Industry on Trial (1985).¹⁷

The efforts of these powerful interests have had their effect. For example, 27 states passed some form of legislation affecting punitive damages between the years 1986 and 1989. ABF 1990, at 3 n. 10. And the perception of crisis — created out of whole cloth — has become accepted as fact in even the highest levels of the body politic.

In fact, however, the best available empirical studies indicate that punitive damages are awarded in only a small fraction of cases and that the median punitive damages award is quite modest. This Court should not alter a long-standing tradition of state common law in response to a "crisis" which simply does not exist.

¹⁷In *Fischer*, the court rejected the argument that the asbestos industry should be shielded from multiple awards of punitive damages, stating:

[W]e do not believe that defendants should be relieved of liability for punitive damages merely because, through outrageous misconduct, they have managed to seriously injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape all liability for punitive damages.

472 A.2d at 585-86 (citation omitted).

CONCLUSION

The judgment of the Supreme Court of Alabama should be affirmed.

Dated: July 13, 1990

Respectfully submitted,

Priscilla Budeiri
TRIAL LAWYERS FOR
PUBLIC JUSTICE
Suite 100

1625 Massachusetts Avenue N.W.
Washington, D.C. 20036
(202) 797-8600

Michael V. Ciresi*
Roberta B. Walburn
ROBINS, KAPLAN, MILLER
& CIRESI

1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-8500

Attorneys for
TRIAL LAWYERS FOR PUBLIC JUSTICE

*Counsel of Record

CENTRAL LIFE INSURANCE COMPANY

Plaintiff

vs. PATRICK HANLEY ET AL.

Defendants

Filed in the Superior Court of Alabama

IN RE: CENTRAL LIFE INSURANCE COMPANY
AS TRUSTEE OF THE PATRICK HANLEY TRUST
IN SUPPORT OF PETITION FOR REFORMATION

JOHN B. HANLEY
Attorney for Plaintiff
100 N. 1st Street, Suite 100
Birmingham, Alabama 35203
Telephone: 252-1234
FAX: 252-1235

U.S. DISTRICT COURT, NORTHEASTERN DISTRICT OF ALABAMA

BEST AVAILABLE COPY

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENTS	3
ARGUMENT	4
I. PUNITIVE DAMAGES HAVE DEVELOPED AT THE STATE LEVEL AS THE ONLY EFFECTIVE PROTECTION AGAINST FRAUD AND OPPRESSION BY CORPORATE GIANTS.	4
II. PUNITIVE DAMAGES UNDER STATE TORT LAWS ARE AN EFFECTIVE MEANS OF DETER- RING CORPORATE MISCONDUCT AND THE ONLY REALISTIC PROTECTION FOR CONSUMERS FROM DISHONEST AND OPPRESSIVE INSURANCE PRACTICES.	7
III. PUNITIVE DAMAGE REMEDIES HAVE BEEN SPARINGLY APPLIED AND HAVE NOT CREATED ANY "CRISIS" AS CLAIMED BY THE INSURANCE INDUSTRY.	13
IV. PUNITIVE DAMAGE AWARDS ARE SUBJECT TO MORE EXACTING STANDARDS THAN THOSE FOR PAIN, SUFFERING AND EMOTIONAL DISTRESS WHICH ARE NOT HELD TO STRICT DUE PROCESS STANDARDS.	22
V. EVERY COURT THAT HAS CONSIDERED THE QUESTION HAS REJECTED THE CONTENTION THAT DUE PROCESS CLAUSE REQUIRES STRICT- ER STANDARDS FOR PUNITIVE DAMAGE AWARDS ..	27
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page
<i>Bankers Life and Casualty Co. v. Crenshaw</i> , 483 So.2d 254 (Miss. 1985), aff'd 108 S.Ct. 1645 (1988).....	11
<i>Beaulieu v. Elliott</i> , 434 P.2d 665 (Alaska 1967).....	2, 3
<i>Bertero v. National General Corp.</i> , 13 Cal.3d 43, 529 P.2d 608 (1974)	18
<i>Betts v. Allstate Ins. Co.</i> , 154 Cal.App.3d 688, 201 Cal.Rptr. 528 (1984).....	10
<i>Boise Dodge v. Clark</i> , 92 Idaho 902, 453 P.2d 553 (1969).....	6
<i>Curtis Publishing Co. v. Butts</i> , 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967)	7, 25, 27
<i>Delos v. Farmers Ins. Group, Inc.</i> , 155 Cal.Rptr. 843, 93 Cal.App.3d 642 (1979)	10
<i>Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.</i> , 189 Cal.App.3d 1072, 234 Cal.Rptr. 835 (1987), cert. denied, ____ U.S. ____, 108 S.Ct. 2023, 100 L.Ed.2d 610 (1988)	27
<i>Eckenrode v. Life of America Ins. Co.</i> , 470 F.2d 1 (7th Cir. 1972)	10
<i>Eichenseer v. Reserve Life Ins. Co.</i> , 881 F.2d 1355 (5th Cir. 1989), petition for cert. filed (No. 89-1303)	28
<i>Egan v. Mutual of Omaha Ins. Co.</i> , 133 Cal.Rptr. 899 (Cal.App. 1976)	28

	Page
<i>Fletcher v. Western National Life Ins. Co.</i> , 10 Cal.App.3d 376, 89 Cal.Rptr. 78 (1970)	11, 28
<i>Flory v. New York Central R.R.</i> , 170 Ohio St. 185, 163 N.E.2d 902 (1959)	24
<i>Goddard v. Grand Trunk Ry.</i> , 57 Me. 202 (1869)	29
<i>Green Oreal Company v. Hornsby</i> , 539 So.2d 218, 223-24 (Ala. 1989)	26
<i>Hammond v. City of Gadsden</i> , 493 So.2d 1374, 1378-79 (Ala. 1986).....	26
<i>Hawkins v. Allstate Ins. Co.</i> , 152 Ariz. 490, 733 P.2d 1073 (Ariz. 1987), cert.denied, 108 S.Ct. 212, rev. denied, 108 S.Ct. 477 (1987).....	10, 21, 25
<i>Hoffman v. Allstate Ins. Co.</i> , 85 Ill.App.3d 631, 407 N.E.2d 156 (1980).....	20
<i>Kink v. Combs</i> , 28 Wis.2d 65, 135 N.W.2d 789, 797 (1965).....	28
<i>Moore v. American United Life Ins. Co.</i> , 197 Cal.Rptr. 878, 150 Cal.App.3d 610 (1984).....	10
<i>Noble v. National American Life Ins. Co.</i> , 128 Ariz. 188, 624 P.2d 866 (1981).....	22
<i>Olson v. Walker</i> , 162 Ariz. 174, 181, 781 P.2d 1015, 1022 (App. 1989)	28
<i>Paul v. Virginia</i> , 75 U.S. 168 (1868)	8
<i>Radloff v. State</i> , 136 Mich.App. 457, 356 N.W.2d 31 (1984)	24

	<u>Page</u>
<i>Steel v. Bemis</i> , 121 N.H. 425, 431 A.2d 113 (1981)	24
<i>Stirling Stores Co., Inc. v. Martin</i> , 238 Ark. 1041, 386 S.W.2d 711 (1965)	23
<i>Sturm, Ruger & Co. v. Day</i> , 594 P.2d 38 (Alaska 1979)	28
<i>The Steamship City of Panama v. Phelps</i> , 101 U.S. 453, 464 (1880)	23
<i>Tibbs v. Great American Ins. Co.</i> , 755 F.2d 1370, 1376 (9th Cir. 1985).....	7
<i>Toole v. Richardson-Merrill, Inc.</i> , 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (1967).....	27
<i>Unified School District No. 490 v. Celotex Corp.</i> , 6 Kan.App.2d 346, 629 P.2d 196 (1981).....	27-28
<i>Walker v. Sheldon</i> , 10 N.Y.2d 401, 179 N.E.2d 497, 233 N.Y.S.2d 488 (1961)	6, 9
Federal Statutes:	
McCarran-Ferguson Act, 15 U.S.C. Sections 1101-15	7, 8
Other Authorities:	
American Bar Foundation, Preliminary Report of the Punitive Damages Project 1986	14
Ashley, <i>Bad Faith Actions</i> , Sec. 9:02	8

	<u>Page</u>
Best Insurance Reports	19
Business Week, May 25, 1987, Finance-Insurance at 123	16
Controller General's Report to the Congress of the United States, PAD 79-72, Oct. 9, 1979	9
Institute for Civil Justice and The Rand Corporation, <i>Punitive Damages: Empirical Findings and Due Process Considerations</i> , November 6, 1989	14
Insurance Services Office, Inc., Claim Evaluation Project (1987)	15
Journal of Commerce, March 19, 1986	15
Journal of Commerce, Oct. 21, 1986	15
Keenan and Gillespie, <i>The Insurer and the Tort of Intentional Infliction of Mental Distress</i> , 39 Ins. Couns. J. 335 (1972)	12
Kornblum and Thornton, <i>The Seismic Impact of Punitive Damages in Actions Against Insurers</i> , 77 Best's Rev. 36 (1976)	12
Letter from Thomas L. Rudd to Charlie Gray, attaching <i>Bodily Injury Claim Cost Impact of Florida Tort Law Change</i> , (Aug. 8, 1986)	13
Levine, <i>Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions</i> , 13 U.S.F.L. Rev. 613, 615 (1979).....	11, 12
Liability Week, Rand Institute for Civil Justice, <i>Punitive Damages Empirical Findings</i> , March 30, 1987	7
McCarthy, <i>Punitive Damages in Bad Faith Cases</i> (4th Ed. 1987)	8

Memorandum from Mechlin D. Moore, President, Insurance Information Institute, to State Presidents and Senior Staff Executives of the Professional Insurance Agents, Nov. 11, 1985	15
Morris, <i>Punitive Damages in Tort Cases</i> , 44 Harv.L.Rev. 1173, 1185-88 (1931)	9
N.B.C. Reports, <i>Protection for Sale; the Insurance Industry</i> , dated April 17, 1982	9
National Underwriter, Dec. 21, 1984, at 2	15
Rand Institute for Civil Justice, <i>Contributions History</i> , Sept. 7, 1984	14, 15
Shernoff, <i>Insurance Company Bad Faith Law — A Potent Weapon for Consumer Protection</i> , TRIAL, May 1981, at 24	10
Statement of Wm. J. Anderson, Assistant Comptroller General, General Government Programs, U.S.G.A.O. before the Subcommittee on Commerce, Consumer Protection and Competitiveness, House Comm. on Energy and Commerce, April 21, 1987	16, 17
Texas State Board of Insurance, Texas Liability Insurance Closed Claim Study 89 (1987)	13
The National Law Journal, <i>Study Says Punitive Awards Aren't Excessive</i> , November 27, 1989	14
The Wall Street Journal, Jan. 23, 1987, at 21	15
United States General Accounting Office, <i>Issues and Needed Improvements in State Regulation of the Insurance Business</i> , (1979)	8

U.S. News and World Report, Corporate Crime— <i>The Untold Story</i> , September 6, 1982, at 25-28	4
Washington Post Magazine, June 22, 1986	15

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner

v.

CLEOPATRA HASLIP, ET AL.,
Respondents

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF NATIONAL INSURANCE CONSUMER
ORGANIZATION AS *AMICUS CURIAE* IN SUPPORT
OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

With the consent of the parties, the National Insurance Consumer Organization respectfully submits this brief as *amicus curiae* in support of respondents. Copies of letters of both parties confirming this consent have been filed with this court.

The National Insurance Consumers Organization (NICO) is a non-profit, non-partisan consumer organization with approximately 2,000 individual members. It is the only national consumer organization which devotes its full time to insurance issues. It was founded in 1980 by J. Robert Hunter, Federal

Insurance Administrator under Presidents Ford and Carter, who is NICO's president and a member of its Board of Directors. NICO's other directors are Howard Clark, former South Carolina Insurance Commissioner, and James Hunt, former Vermont Insurance Commissioner.

NICO receives frequent complaints from its members and other insurance policyholders about alleged misconduct by insurance companies. It is NICO's purpose to suggest various remedies that such policyholders may have, as well as to recommend and advance public policy in the insurance consumer's interest.

As is discussed in this brief, the insurance industry, free from federal regulation and subject to governmental control only by relatively weak state insurance departments, is only truly regulated by court action in individual tort claims, especially where such state court causes of action carry the threat of punitive damage awards to punish and deter corporate misconduct. Because petitioner in the present case seeks to impose strict limits on punitive damages, the only truly effective weapon available to insurance consumers in their struggle for fair claims treatment, NICO and those it represents have a direct and substantial interest in this case.

NICO files this brief to bring to the Court's attention the crucial importance of punitive damages to insurance consumers across the country.

Amicus is concerned that the position taken by petitioners and amici counsel in support of appellants, is another attempt to tamper with state tort law remedies which have been the only effective means of curbing oppressive insurance claims practices and deterring other commercial torts.

SUMMARY OF ARGUMENTS

Punitive damages have developed as the most effective means by which the states can protect their citizens against corporate misconduct. They have been especially important in controlling the powerful and largely unregulated insurance industry. Punitive awards are the only effective manner of punishing and deterring wide spread claims abuses by the industry. Further, the cost of such regulation is borne not by society, but by the wrongdoers themselves. Punitive assessments provide the incentive for individual victims and their attorneys to take on an opponent for whom they would otherwise be no match.

While the benefits to insurance consumers derived from punitive awards are great, evidence shows that the cost of such awards to the industry as a whole is minimal. Though the insurance industry has engaged in a massive public relations campaign to persuade the public, and now this Court, that punitive damage payments are out of control, the empirical evidence proves otherwise. Far from creating any sort of "crisis" in the insurance industry, such damage assessments by state courts are playing a crucial role in reforming long standing claims abuses.

It is abundantly clear that the real objection to punitive damages by Petitioner and the large amici corporations is simply that large amounts of money are involved when juries attempt to punish and deter malicious, oppressive or outrageous conduct. For if they truly believed that due process of law requires strict federal standards to limit a jury's discretion, to provide notice of and uniformity regarding the amount of verdicts, then Petitioners and amici would argue that such standards must apply not only to punitive damages, but to compensatory damage awards for pain and suffering or emotional distress as well. The adoption of stricter federal standards for

assessments of punitive damages would throw the entire tort system into chaos as all assessments for pain and suffering or emotional distress would immediately be appealed under the same theory that due process requires such stricter standards to these types of damages.

In addition, for this Court to find that due process of law requires stricter standards for punitive damage awards, it must overrule every appellate court that has ever considered the question. State courts, and most recently the Fifth Circuit Court of Appeals, have uniformly rejected the due process argument either because the constitutionally-mandated safeguards provided in criminal actions do not apply to private civil actions not involving the state, or because the safeguards already in place are sufficient to pass due process muster.

ARGUMENT

I. PUNITIVE DAMAGES HAVE DEVELOPED AT THE STATE LEVEL AS THE ONLY EFFECTIVE PROTECTION AGAINST FRAUD AND OPPRESSION BY CORPORATE GIANTS.

Governmental sanctions over the years have been notoriously inadequate in curbing corporate wrongdoing. This is no doubt due, in part, to a corporation's immunity from the threat of criminal prosecution's principal inherent weapons: loss of liberty and personal humiliation. In those rare cases where individual officers of corporations have been prosecuted, punishment has been woefully lax in comparison with the enormous amounts of money to be gained by wrongful activity. A study in U.S. News and World Report entitled "*Corporate Crime—The Untold Story*," September 6, 1982, at 25-28; states:

In comparison with the prison terms routinely dealt out to robbers and muggers, corporations and their

executives, like other white-collar criminals, get off easy. Most offenses with which corporations are charged carry low fines that have not changed in years and, at worst, are minor irritants.

...

When Westinghouse Electric Company pleaded guilty in 1978 to charges involving bribery of an Egyptian official, the maximum fine was \$300,000—one percent of the value of the 30-million-dollar contract it had obtained.

...

Even when convicted and punished, it is not unusual for an executive to be welcomed back into the company's hierarchy.

In the corporate world, as everywhere else, there are examples of good and bad conduct. As stated by Robert Miles, Associate Professor of Business Administration at Harvard University, "some firms are 'real Neanderthals,' money-grubbing and ethically insensitive, while others are law-abiding and socially conscious." *Id.*

In certain areas, misconduct has been especially widespread:

In a few instances, almost entire industries have been caught breaking the law.

....

When a corporation gets into trouble, whether the charge is price fixing, bribery, kickbacks, tax evasion or pollution, the frequent explanation is: "Everybody does it." It is an idea that soothes the consciences of the culprits, and sometimes it is almost literally true. (*Id.*)

In such situations, where a corporate defendant has acted,

and continues to act, in violation of the rights of a large group of people solely for the calculated purpose of making more money, punitive damage awards by state courts are the only effective remedy. In *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 233 N.Y.S.2d 488 (1961), the Court observed:

[T]hose who deliberately and coolly engage in a far-flung fraudulent scheme, systematically conducted for profit, are very much more likely to pause and consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff. An occasional award of compensatory damages against such parties would have little deterrent effect. A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Id., 10 N.Y.2d at 406, 179 N.E.2d at 499, 233 N.Y.S.2d at 492. See also, *Boise Dodge v. Clark*, 92 Idaho 902, 453 P.2d 553 (1969).

This Court has also recognized the legitimate deterrent effect of punitive damages:

Especially in those cases where circumstances outside the publication itself reduce its impact sufficiently to make a compensatory imposition an inordinately light burden, punitive damages serve a wholly legitimate purpose in the protection of individual reputation.

Curtis Publishing Co. v. Butts, 388 U.S. 130, 161, 87 S.Ct. 1975, 1994, 18 L.Ed.2d 1094 (1967).

As discussed in the following section, the principles cited above are especially applicable to the insurance industry.

II. PUNITIVE DAMAGES UNDER STATE TORT LAWS ARE AN EFFECTIVE MEANS OF DETERRING CORPORATE MISCONDUCT AND THE ONLY REALISTIC PROTECTION FOR CONSUMERS FROM DISHONEST AND OPPRESSIVE INSURANCE PRACTICES.

The increase in punitive damage assessments against corporations can, in large measure, be attributed to the increase in insurance bad faith litigation¹ From the reported cases is evident that fraudulent, malicious and oppressive conduct by insurance carriers runs rampant.

Sometimes the attitude of the companies is one of defiance and contempt when courts try to encourage fair and reasonable claim practices. In *Tibbs v. Great American Ins. Co.*, 755 F.2d 1370, 1376 (9th Cir. 1985), the company's response to the judge's advice to provide legal defense on a claim, was "F--- the Judge," and "no court of law is going to tell us what to do." Punitive damages can help remove an aura of arrogance and insolence that has permeated the industry.

The insurance industry has remained free of federal regulation through the McCarran-Ferguson Act, 15 U.S.C. Sections

¹E.g.: A study of jury trials in San Francisco and Chicago concluded that an overall increase in the number and size of punitive damage awards between 1975 and 1985 was overwhelmingly accounted for by business and contract cases—most notably insurance bad faith cases. Rand Institute for Civil Justice, "Punitive Damages: Empirical Findings" (1987) reported in *Liability Week*, March 30, 1987.

1101-15, which effectively eliminated federal regulation by transferring responsibility to the states.²

State insurance departments frequently have neither the willingness nor the ability to meaningfully regulate insurer conduct.³ When insurance companies engage in misconduct, according to a study of state insurance regulation by the United States General Accounting Office in 1979, "the authority of departments to order corrective action is very limited." *United States General Accounting Office, "Issues and Needed Improvements in State Regulation of the Insurance Business,"* at ii (1979);. In addition, as the GAO rather delicately put it, "insurance regulation is not characterized by an arms-length

²In *Paul v. Virginia*, 75 U.S. 168 (1868), this Court removed insurance from the field of federal regulation through the Commerce Clause, thereby leaving the matter to the state courts and state insurance commissioners. Ashley, *Bad Faith Actions*, Sec. 9:02, explains that thereafter:

The latter proved ineffective in controlling insurance abuses: the commissioners usually came from the ranks of the insurance industry and, after short tours of duty, returned to the companies they had regulated.

In 1944, however, the Supreme Court issued its decision in *United States v. South-Eastern Underwriters Association*. This decision sent shivers down the spines of insurance company executives, who feared the prospect of federal agencies, particularly the Federal Trade Commission, interfering with the insurers' cozy relationships with the state insurance commissioners.

The insurance industry devised an ingenious plan to head off federal regulation. It persuaded Congress to introduce legislation, known as the McCarran-Ferguson Act. . .

³E.g.: At least 39 states have enacted some form of Unfair Claims Practices legislation, which, ironically, was originally lobbied for by the insurance industry to substitute for and forestall federal regulation. J. McCarthy, *Punitive Damages in Bad Faith Cases* (4th Ed. 1987), at vi. These statutes proscribed many of the same types of insurer conduct that have been the subject of common-law bad faith litigation, but the statutes only provide as sanctions relatively minor fines payable to the state and lack express provisions for private enforcement. *Id.*

relationship between the regulators and the regulated," with insurance commissioners typically coming from and returning to the industry. *Id.* at vii.

As noted by the *Controller General's Report to the Congress of the United States*, PAD 79-72, Oct. 9, 1979; an in-depth study of the inability of state insurance departments to properly regulate the industry, the insurance industry is simply too large for any state administrative agency to control. Similarly, an investigation entitled *N.B.C. Reports: "Protection for Sale; the Insurance Industry,"* dated April 17, 1982, revealed:

WE FOUND ALMOST EVERYWHERE WE WENT — STATE REGULATORS DOING AN INEFFECTIVE JOB. THE FEDERAL GOVERNMENT HAS SHOWN FOR DECADES THAT IT HAS LITTLE INTEREST IN GETTING INVOLVED. AND SO, CONSUMERS END UP HAVING TO TAKE ON THIS SPRAWLING INDUSTRY LARGELY BY THEMSELVES. IT IS NOT A FAIR MATCH. . . . (Capitalization in original.)

Id. at 74.

Because of the lack of effective oversight of insurance claims practices by government, punitive damages are the only real deterrent to malicious and oppressive conduct by insurance companies, just as they are the only meaningful punishment for such conduct. If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with virtual immunity. See *Walker v. Sheldon*, *supra*. Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1185-88 (1931), (recommending punitive damages "where the risk of having to pay compensation probably would not discourage the commission of wrongs.'')

Insurance practices as disclosed by reported cases can only be described as shocking in view of the fact that it is an industry affected with a public interest, an industry which promises that it will afford protection in a time of need. The courts have assessed punitive damages based on conduct which was dishonest, malicious and outrageous: *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073 (Ariz. 1987); [For over 18 years the company taught adjusters to cheat by "chiseling" small amounts on claims because policyholders would probably not object to these small deductions]; *Moore v. American United Life Ins. Co.*, 197 Cal.Rptr. 878, 150 Cal.App.3d 610 (1984); [Disability insurance benefits denied by use of misleading and deceptive settlement practices firmly grounded in an established company policy that had the potential of defrauding countless insureds other than plaintiff]; *Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 201 Cal.Rptr. 528 (1984); [A large judgment in excess of liability policy limits when "Allstate wilfully manipulated its own client," and "deliberately concealed adverse reports . . . from their own insured"]; *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972); [Life insurer's practice was to not pay meritorious claims and to use "economic coercion" to "compromise" valid claims.] *Delos v. Farmers Ins. Group, Inc.*, 155 Cal.Rptr. 843, 93 Cal.App.3d 642 (1979); ["Nefarious scheme to mislead and defraud thousands of policyholders."]

Punitive damages help to give policyholders some semblance of protection. The importance of punitive damages is summarized in an article entitled, "*Insurance Company Bad Faith Law — A Potent Weapon for Consumer Protection*," by William M. Shernoff, Trial, May 1981, at 24, as follows:

[T]he imposition of punitive damages in a handful of bad faith cases in California has without a doubt generated a more thorough review by the insurance industry of its claims practices than was accomplish-

ed by ten years of legislative efforts to regulate insurance claims practices. . .

Punitive damages have played an "increasingly significant role in protecting contemporary society from many non-regulated or inadequately regulated businesses and industries" Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613, 615 (1979). These societal goals are being reached through the use of sanctions, the cost of which is being borne by the wrongdoer and not society.

Through punitive damage assessments, the corporate wrongdoer is forced to reward the consumer for his public service of bringing that wrongdoer to justice. *Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254, 269 (Miss. 1985), aff'd 108 S.Ct. 1645 (1988): The "reward" function of punitive damages is especially important in insurance cases where compensatory damages alone are not of sufficient magnitude to make it economically feasible for a lawyer to pursue the case, or for a plaintiff of modest means to pay expenses in connection with the case — particularly in view of the ability of insurers, with resources thousands of times greater than the plaintiff's, to simply wear him down during the course of litigation.

The public service performed by plaintiffs who bring insurance bad faith cases is enormous: they encourage insurance companies to deal more fairly with their policyholders. For example, in 1970 the California Court of Appeals upheld a punitive damage judgment against an insurer which had sought to induce a disabled policyholder into surrendering his policy by writing him false and threatening letters. *Fletcher v. Western National Ins. Co.*, 89 Cal.Rptr. 78 (App. 1970). Soon thereafter, two insurance company lawyers wrote an article advising insurers that *Fletcher* made it imperative for them

to be cautious and fair in handling claims, since "any deviations from ethical business practices will subject them to harsh reprimands."⁴ Keenan and Gillespie, *The Insurer and the Tort of Intentional Infliction of Mental Distress*, 39 Ins. Couns. J. 335 (1972); Similarly, a 1976 article in an insurance journal suggested nine steps, including making full disclosure to the insured and paying claims promptly, that insurers should take to avoid bad-faith punitive damage verdicts.⁵ Kornblum and Thornton, *The Seismic Impact of Punitive Damages in Actions Against Insurers*, 77 Best's Rev. 36 (1976). Dozens of other articles urging insurance companies to reform their claims practices have been written. They do not urge insurers to avoid dealing in bad-faith because it is immoral, but only because it subjects them to the possibility of large punitive damage judgments.⁶

Without the availability of a punitive award, most insurance consumers simply could not afford the expense of bringing widespread claims abuses to the attention of the courts. Punitive damage verdicts, along with other progressive reforms, are helping to regulate insurers who are being inadequately regulated by administrative agencies and the conduct of the entire insurance industry is grudgingly being reformed to conform to the reasonable interests and expectations of the public.

⁴Keenan and Gillespie, *The Insurer and the Tort of Intentional Infliction of Mental Distress*, 39 Ins. Couns. J. 335 (1972).

⁵Kornblum and Thornton, *The Seismic Impact of Punitive Damages in Actions Against Insurers*, 77 Best's Rev. 36 (1976).

⁶See generally Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613 (1979).

III. PUNITIVE DAMAGE REMEDIES HAVE BEEN SPARINGLY APPLIED AND HAVE NOT CREATED ANY "CRISIS" AS CLAIMED BY THE INSURANCE INDUSTRY.

Because punitive awards further the purposes described above, their benefit to society is clear and substantial. Thus, even if the availability of such awards imposed substantial costs on insurers, the benefits of punitive damages would justify those costs. In fact, however, the evidence indicates that such awards have been applied sparingly and selectively, with minimal costs to the industry as a whole.

In February 1987, for example, the Texas State Board of Insurance analyzed 3,367 claims that had been closed in Texas between November 1983 and December 1986. The total paid out in those cases was \$487,703,243; the total paid out in punitive damages was \$100,000, or about 1/50 of 1% of the total. Texas State Board of Insurance, *Texas Liability Insurance Closed Claim Study 89* (1987);. Punitive damages were assessed in 6/10 of 1% of general liability claims, and 2/10 of 1% of medical malpractice claims. *Id.* at 32.

Similarly, Aetna Insurance Company also conducted a study which concluded that the cost of punitive damages was minimal. In order to determine the effect on its claim costs of Florida's new "tort reform" law, which included limitations on punitive damages, Aetna analyzed 105 claims it had recently closed. In submitting to the Florida Insurance Commissioner the analysis which demonstrated that the new law would have no effect, Aetna explained that punitive damages had an impact on the claim settlement value in only 2 of the 105 cases. It estimated the total impact to be less than \$15,000 — less than 1/10 of 1% of its total indemnity payments. Letter from Thomas L. Rudd, Superintendent, Insurance Department Affairs — Commercial Lines, to Charlie Gray, Chief, Bureau of Policy and Contract Review, Attachment entitled "Bodily In-

jury Claim Cost Impact of Florida Tort Law Change," Aug. 8, 1986.

A survey of jury verdicts from over 30 jurisdictions in 10 states by the American Bar Foundation confirms the Aetna and Texas findings. The Foundation found that the percentage of plaintiff's verdicts that included a punitive damage component ranged from 0% in four jurisdictions to a high of 21.6% in Cobb County, Georgia. The percentage for New York City, Cook County, and Los Angeles County — the three largest metropolitan areas in the nation — were 1.6%, 2.2%, and 8.6% respectively. American Bar Foundation, Preliminary Report of the Punitive Damages Project 10-11, Feb. 8, 1986. Similarly, a study of the punitive damage awards for the state of California as a whole during the years 1980-1984 revealed such awards in only 5.1% of trials. Institute for Civil Justice and The Rand Corporation, "Punitive Damages: Empirical Findings and Due Process Considerations," November 6, 1989.

Finally, the Rand Corporation's Institute for Civil Justice, which receives approximately half its funding from the insurance industry,⁷ Rand Institute for Civil Justice, Contributions History, Sept. 7, 1984; acknowledges that only about half the amount awarded as punitive damages is ultimately paid out,⁸ The National Law Journal, "Study Says Punitive Awards Aren't Excessive," November 27, 1989; that punitive damage judgments are most frequent where defendants were found

⁷Rand Institute for Civil Justice, *Contributions History*, Sept. 7, 1984.

⁸Nor are punitive damage judgments any more prevalent in the area of product liability, nor any more likely to be paid before substantial appellate review. A recent study by the General Accounting Office prepared for the House Subcommittee on Commerce, Consumer Protection, and Competitiveness revealed only 12 punitive awards in the 305 cases studied which went to verdict. *In all 12 cases, appellate courts reversed or remanded for retrial the punitive damage award.* The National Law Journal, "Study Says Punitive Awards Aren't Excessive," November 27, 1989.

to have intentionally harmed plaintiffs, and that most punitive damage judgments are modest.⁹

In short, the benefit of punitive damage is enormous while the cost is minimal. While the insurance industry in recent years has launched a public relations campaign against the legal system in general and punitive damages in particular,¹⁰ the

⁹Rand Institute for Civil Justice, "Punitive Damages: Empirical Findings," (1987) reported in Liability Week, March 30, 1987, at 2.

¹⁰In December 1984, for example, the Insurance Information Institute (III), the industry's public relations arm, launched what it called an "effort to market the idea that there is something wrong with the civil justice system in the United States." National Underwriter, Dec. 21, 1984, at 2. Pursuant to that effort it sent a kit on the "civil justice crisis" to insurance executives and agents urging them to tell their policyholders and the media that "Insurers have no recourse but to cut back on liability insurance until improvements in the civil justice system will create a fairer distribution of liability, reduce the number of lawsuits and create a climate in which insurance can operate more predictably." Insurance Information Institute, "Outline for Speech: Crisis in the Civil Justice System," at 7, attachment to Memorandum from Mechlin D. Moore, President, Insurance Information Institute, to State Presidents and Senior Staff Executives of the Professional Insurance Agents, Nov. 11, 1985. Soon thereafter, the III announced a new \$6.5 million television and magazine advertising campaign designed, in the III's words, "to change the widely-held perception that there is an insurance crisis to a perception of a lawsuit crisis." Journal of Commerce, March 19, 1986, at 1, 20. The ads featured polio victims, mothers, ministers and high school athletes stating that "doctors are afraid to deliver babies, clergy are becoming reluctant to counsel their congregations, and high schools are thinking about closing down their sports programs" because of the "lawsuit crisis." E.g. Insurance Information Institute, "No One is Immune From the Lawsuit Crisis," The Washington Post Magazine, June 22, 1986. This year, amicus Aetna has been running similar ads. see, e.g., The Wall Street Journal, Jan. 23, 1987, at 21. Johnson & Higgins has also run similar ads. E.g., Johnson & Higgins, "Insurance is Getting Killed in Self-Defense."

Ironically, now that "tort reforms" have been enacted in several states the insurance industry has found that "the impact of the [tort] changes generally ranged from marginal to imperceptible." Insurance Services Office, Inc., Claim Evaluation Project, at 4 (1987). See also "No Florida Savings Seen from Tort Law Reform," Journal of Commerce, Oct. 21, 1986 at 1A.

empirical evidence demonstrates that the industry has been trying to "cry wolf."

A recent analysis of the so-called insurance "crisis" by a business publication states:

During the 1986 crisis, the industry embarked on a splashy public relations campaign proclaiming that the "insurance crisis" was really a "lawsuit crisis." Some three dozen states did make minor changes in the law. But the insurance crisis has abated without help from an overhaul of the nation's civil justice system.

Cool analysis is discrediting last year's horror stories about an epidemic of multimillion-dollar jury awards for relatively little cause. In a sample of 359 cases in the 1982-85 period, mostly involving product liability, punitive damages were "insignificant," according to a study published by the American Enterprise Institute. "The civil litigation system is stable," says Mark Peterson of the Rand Institute for Civil Justice. Only in mass toxic tort cases, notably those involving asbestos, is potentially enormous cost a real concern. (Emphasis added.)

Business Week, May 25, 1987, Finance-Insurance at 123;. The industry's alleged punitive damage "crisis" is no more legitimate than the industry's claims of financial distress.¹¹

¹¹An investigation by the Government Accounting Office, Congress' investigative arm, found that the insurance industry was healthy and that insurers earned after tax profits of 19 Billion Dollars in 1986, when the insurance "crisis" was at its peak. "The industry's earnings improved from \$9.7 billion in 1985 to about \$19 billion in 1986." Statement of Wm. J. Anderson, Assistant Comptroller General, General Government Programs, U.S.G.A.O. before the Subcommittee on Commerce, Consumer Protection and Competitiveness, House Comm. on Energy and Commerce, April 21, 1987, page 4.

Statement of Wm. J. Anderson, Assistant Comptroller General, General Government Programs, U.S.G.A.O. before the Subcommittee on Commerce, Consumer Protection and Competitiveness, House Comm. on Energy and Commerce, April 21, 1987, page 4.

Other studies, such as the Preliminary Report of the Punitive Damages Project by the American Bar Foundation in 1986 used a statistical analysis and found the following:

Perhaps what is most interesting . . . in light of the claims made about the incidence of punitive damage awards, is how low the percentage of punitive awards is in a number of sites. For instance, the percentage of reported verdicts in which the plaintiff wins money that include punitive awards is only 1.6% in New York City (all five counties making up New York City combined), 2.2% in Cook County, County, Illinois (which includes Chicago), and 8.6% in Los Angeles County, California. These three sites represent the three largest cities in the country, and they do not appear, generally speaking, to be facing a punitive damages storm. Punitive damages, in terms of their incidence, are unusual in these sites.

. . .

These tables reflect one particularly important consistency — punitive damages are not routine across all causes of action (this, of course, may be driven in part by differences in the law). The higher percentages of reported verdicts in the money that include a punitive award are clustered, typically, in a small set of causes of action: personal violence, fraud, false arrest, and insurance bad faith. . . .

. . . .

[T]hese preliminary findings are sufficient to call into question many of the claims made in both profes-

sional circles and the mass media about punitive damages as well as the civil justice system generally. Punitive damages are not, in the sites we have studied at least, routine, nor are they necessarily awarded in amounts that boggle the mind. Relatively high percentages of verdicts with punitive damages appear in only a few sites, yet the median awards are relatively low in these sites. Punitive damages appear to be clustered in certain types of cases, ones that might be expected given the purposes of punitive damages. Extremely high dollar awards do not appear to be the norm, and they tend to appear in only a handful of causes of action which do not account for large proportions of the case load and in which plaintiffs are not as likely to win any money at all.

The insurance industry's concern over the number and size of punitive damage verdicts is misplaced. Given the state of the economy and particularly the healthy financial condition of the insurance industry, it would be expected that the amounts of such verdicts would increase each year. Every state has standards for assessment of punitive damages. One of the universal standards is that in determining the amount necessary to deter, the wealth of the defendant may be considered. Indeed, for punitive damages to fulfill the function of deterrence, it is necessary that such an assessment be considered in relation to the wealth of the defendant. "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." *Bertero v. National General Corp.*, 13 Cal.3d 43, 529 P.2d 608, 624 (1974).

An examination of the financial history of major insurance companies readily explains why the punitive damage trend would necessarily increase in amount if the deterrent purpose

of such damages is to be accomplished. For example, one company which writes virtually every line of insurance more than doubled its wealth over a 10 year period from almost two billion to over four and a half billion dollars. Its 10 year financial history is as follows:

ALLSTATE INSURANCE COMPANY

Year	Net Worth "Surplus" (In Dollars)
1979	1,981,089,058
1980	2,371,135,879
1981	2,395,168,905
1982	2,822,164,434
1983	3,197,752,369
1984	3,229,029,379
1985	3,676,523,111
1986	4,081,689,528
1987	3,939,240,438
1988	4,154,135,463
1989	4,524,478,559

Source: *Best Insurance Reports*, and the 1989 Allstate Annual Financial Statements filed with the Arizona Department of Insurance.

Using an insurer's present net worth of 4 Billion Dollars, a punitive damage assessment of \$1,000,000 for fraud or malice or intent to harm could hardly be considered excessive. The same ratio of punishment to a person with net worth of \$10,000 would be \$2.50; to a person with a net worth of \$100,000 would be a punitive assessment of \$25.00; and to a person or company with net worth of \$1,000,000, an equivalent punitive assessment would be \$250.00. Insurance companies or other wealthy wrongdoers cannot be given preferential and unequal treatment merely because they possess great wealth.

Increases in the number and amount of punitive damage verdicts would also be expected over the past 10 years because of the evolution of the law and the increased awareness and knowledge by the courts of commercial torts. Not only has there been heightened recognition that intentional and profitable civil misconduct should not be protected or condoned, but the civil justice system through reported decisions has educated the courts regarding dishonest business schemes which were not recognized 10 or 15 years ago. Each reported insurance bad faith case seems to uncover additional schemes used to cheat policyholders of the protection they had purchased.

An example is an unfair claims practice which was discovered ten years ago in a state which did not recognize insurance bad faith. The practice therefore went unpunished. *Hoffman v. Allstate Ins. Co.*, 85 Ill.App.3d 631, 407 N.E.2d 156 (1980). In *Hoffman*, the company used a "cleanup" deduction on a total loss auto collision claim to reduce pay-out, and got away with it, as explained in the case:

[O]ne of the defendant's adjusters, Jack Dooley, informed plaintiff that defendant deemed the car a total loss; he tendered and plaintiff accepted a check for \$116.37 in full payment of the loss pursuant to the collision coverage Dooley explained . . . this figure; included . . . deduction of \$55 which Dooley said was for "dealer preparation and shampoo." When plaintiff asked Dooley why such a deduction was made on a totally destroyed car, Dooley responded with words to the effect that "Allstate always does that." The check was returned uncashed to defendant on October 20, 1978. Plaintiff twice requested the location of the car for the purpose of having it appraised and apparently was never given this information.

Id. 407 N.E.2d at 157.

The Illinois Appellate Court, not recognizing insurance bad faith, affirmed the lower court dismissal of tort claims and punitive damages, and stated:

Count III sounds in tort for fraud, alleging that defendant made "spurious" deductions from the retail value of the car and induced the plaintiff to accept the \$116.37 check by representing those deductions as being legitimate.

. . . .

[P]laintiff returned the \$116.37 check to defendant uncashed. Consequently, no apparent injury resulted from any purported reliance on defendant's representations, and the dismissal of Count III was proper.

Id. 407 N.E.2d at 158.

Thus, the plaintiff was left with an ineffective remedy. With no punitive damages available to him on the claim which remained under Illinois law, there was no incentive for the insurer to change its practices.

Several years later, the same practice, designed to cheat policyholders out of millions of dollars each year, was addressed in a state recognizing the tort of insurance bad faith and an appropriate punitive assessment was made for the purpose of deterring similar conduct in the future. *Hawkins v. Allstate Ins. Co.*, *supra*. In *Hawkins*, the evidence showed that the same company was still using its "cleanup" deduction on every total loss collision claim for the purpose of increasing its profits at the expense of its insureds. The *Hawkins* Court found "the deceptive practices were established company policy" for up to 18 years before the time of trial. The practices were exposed and hopefully deterred in *Hawkins* only because

punitive damages were permissible with the advent of insurance bad faith as a tort in Arizona in 1981.¹²

Unfortunately, there will always be the company or individual who will seize upon the opportunity to turn a quick gain by imposing injury and deceit upon others. To those so disposed, punitive damages are the best response available. The availability of punitive damages in civil litigation will continue to serve the purpose of forewarning other defendants that their energy and finances are more prudently spent improving their own standards and conduct, and operating within existing legal principles. Those who are called upon to account for their conduct will always be assured their day in court, in accordance with historically accepted standards of civil due process. The present standards and procedure reconcile a defendant's interest in incurring monetary judgments only when supported by the evidence, with society's interest in insuring that corporate wrongdoing is both rectified and deterred in the future.

IV. PUNITIVE DAMAGE AWARDS ARE SUBJECT TO MORE EXACTING STANDARDS THAN THOSE FOR PAIN, SUFFERING AND EMOTIONAL DISTRESS WHICH ARE NOT HELD TO STRICT DUE PROCESS STANDARDS.

Petitioner contends that the system governing the award of punitive damages gives too much discretion to the jury or trial court, provides insufficient guidance to channel the decision, and argues that federal standards should be imposed to assure a minimum level of fairness. If these contentions are adopted by this Court, there is no logical reason why they would not also apply to compensatory damage awards for pain

¹²*Noble v. National American Life Ins. Co.*, 128 Ariz. 188, 624 P.2d 866 (1981).

and suffering and emotional distress. Yet no one is arguing, and research has uncovered no appellate decision where it has ever been argued, that the constitution requires federal standards for awards of pain and suffering and emotional distress. It is obvious that the constitutional attacks on punitive damages by Petitioner and Amici are really based on the amount of money involved and not on theoretical or intellectual grounds.

As shown below, punitive damage awards in Alabama and other states are subject to more exacting standards than those for pain, suffering and emotional distress. This Court must recognize that adoption of the rules proposed by Petitioner and Amici for punitive damages will surely have the chaotic and disastrous effect of calling into question all awards for pain and suffering and emotional distress, which are left to the largely unfettered discretion of juries.

This Court has long recognized that pain and suffering awards cannot be subject to any fixed standards:

Damages, in such a case, must depend very much on the facts and circumstances proved at the trial. When the suit is brought by the party for personal injuries, there cannot be any fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted.

The Steamship City of Panama v. Phelps, 101 U.S. 453, 464 (1880). State courts have uniformly agreed.¹³

¹³See, e.g., *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967); ("There is no fixed measure of compensation in awarding damages for pain and suffering."); *Stirling Stores Co., Inc. v. Martin*, 238 Ark. 1041, 386 S.W.2d 711 (1965); ("We have said many times that there is no definite or satisfac-

Petitioner and Amici argue generally that current punitive damage law is unconstitutional because the tortfeasor does not know the size of the judgment that may be rendered against him because the jury is not guided by detailed standards, causing a wide disparity in judgments for similar conduct. No one seriously contends that the framers of the constitution contemplated that fixed standards and limits would be placed on punitive damage awards, and there is no consensus as to what such standards and limits should be nor who should decide them. But if the constitution truly requires such fixed standards for punitive damage awards, then there is no logical reason why such standards should not also apply to compensatory awards for pain, suffering, and emotional distress. For the tortfeasor who is merely negligent also does not know the size of the judgment that may be rendered against him, as verdicts for pain and suffering can vary significantly under similar facts. It is therefore virtually certain that adoption of specific strict standards for punitive damages will plunge the entire tort system into chaos, as jury verdicts for pain, suffering and/or emotional distress will be appealed on due process grounds throughout the country.

Punitive damage awards are already subject to several

tory rule to measure compensation for pain and suffering, but the amount of damages must depend upon the circumstances of each particular case, and much must be left to the discretion of the jury.''); *Radloff v. State*, 136 Mich.App. 457, 356 N.W.2d 31 (1984); ('It is well-established that there are no absolute standards by which to measure personal injury awards, particularly awards for pain and suffering, which should rest within the sound judgment of the trier of fact.''); *Steel v. Bemis*, 121 N.H. 425, 431 A.2d 113 (1981); ('No one to our knowledge has been able to devise a formula by which compensation for pain and suffering can be determined with precision. . . In order to hold a verdict as excessive we must conclude that no reasonable person could have returned such a verdict.''); *Flory v. New York Central R.R.*, 170 Ohio St. 185, 163 N.E.2d 902 (1959); ('Such determination is susceptible to no mathematical or rule of thumb computation.'').

avenues of review to assure that they are justified: The plaintiff must prevail on a motion for directed verdict, the jury must exercise its discretion to award punitive damages, the verdict is subject to post-trial motions and review by the trial judge, and the judgment is subject to appeal. All of these procedures are designed to assure that the award is justified and not the result of the jury's passion or prejudice. *See, Hawkins v. Allstate Ins. Co.*, *supra*, 152 Ariz. at 504, 733 P.2d at 1087. This Court also has recognized that judicial control is an adequate safeguard over excessive punitive damage awards. In rejecting a contention that a punitive damage award against a magazine publisher, limited only by the "enlightened conscience" of the community, constituted an effective prior restraint by giving the jury the power to destroy the publisher's business, this Court stated:

We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts, manifested in this instance by the trial court's remittitur, and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted.

Curtis Publishing Co. v. Butts, *supra*, 388 U.S. at 159-60, 87 S.Ct. at 1994.

Punitive damage awards are already subject to more exacting standards than those for pain and suffering and emotional distress. Alabama law, at issue in this case, requires the trial court to consider the following factors for a punitive damage award:

(1) Punitive damages should bear a reasonable relation to the harm that is likely to occur from the defendant's conduct, as well as the harm that actually has occurred. If the actual or likely harm is slight, the

damages should be relatively small. If grievous, the damages should be much greater.

(2) The degree of reprehensibility of defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or cover-up of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of responsibility.

(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit, and should be in excess of this profit, so that the defendant recognizes a loss.

(4) The financial position of the defendant would be relevant.

(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Hammond v. City of Gadsden, 493 So.2d 1374, 1378-79 (Ala. 1986); *Green Oreal Company v. Hornsby*, 539 So.2d 218, 223-24 (Ala. 1989). These standards far exceed those for compensatory awards for pain, suffering and emotional distress, which typically are upheld unless the amount "shocks the conscience" of the court.

Just as there can be no mathematical formula or set standards for pain and suffering awards, there can be none for punitive damages. Both depend on the facts and circumstances of each particular case. Judicial control adequately safeguards against excessive punitive damage awards. The Due Process Clause does not require anything more.

V. EVERY COURT THAT HAS CONSIDERED THE QUESTION HAS REJECTED THE CONTENTION THAT THE DUE PROCESS CLAUSE REQUIRES STRICTER STANDARDS FOR PUNITIVE DAMAGE AWARDS.

As noted above, this Court has already rejected the argument that a punitive damage award limited only by the "enlightened conscience" of the community was unconstitutional, by finding that judicial control over excessive jury verdicts is an adequate safeguard. *Curtis Publishing Co. v. Butts*, *supra*. That case was decided on First Amendment grounds, so it is true that this Court has yet to decide whether stricter standards are necessary in private civil punitive damage cases to satisfy the Fourteenth Amendment guarantee of due process.

Courts in several jurisdictions, however, have squarely addressed this question and they have uniformly rejected the contention that due process requires stricter standards for punitive damage awards. These decisions are based on two grounds. First, civil actions, even when punitive in nature, do not require the constitutionally-mandated safeguards provided in criminal actions, *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal.App.3d 1072, 234 Cal.Rptr. 835, 852 (1987), cert. denied, 486 U.S. 1036, 108 S.Ct. 2023, 100 L.Ed.2d 610 (1988); *Toole v. Richardson-Merrill, Inc.*, 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (1967); *Unified School*

District No. 490 v. Celotex Corp., 6 Kan.App.2d 346, 629 P.2d 196 (1981). Second, the safeguards already in effect adequately provide due process of law, *Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989), petition for cert. filed (No. 89-1303); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979); *Egan v. Mutual of Omaha Ins. Co.*, 133 Cal.Rptr. 899, 914-15 (Cal.App. 1976); *Kink v. Combs*, 28 Wis.2d 65, 135 N.W.2d 789, 797 (1965); *Fletcher v. Western National Life Ins. Co.*, 10 Cal.App.3d 376, 405, 89 Cal.Rptr. 78 (1970). At least one opinion is based on both of these rationales, *Olson v. Walker*, 162 Ariz. 174, 781 P.2d 1015, 1022 (App. 1989).

The two most recent of these decisions are particularly noteworthy. In *Eichenseer v. Reserve Life*, the Fifth Circuit Court of Appeals noted that no circuit court had yet ruled on the applicability of the due process clause, but decided that it need not do so because no due process violation existed on the facts of the case before it. The court based this conclusion on the fact that well-established Mississippi law of insurance bad faith gave the insurer notice that its conduct could subject it to punitive damages liability, and in fact a punitive damages award had previously been awarded against the insurer for conduct similar to that in the instant case. The court also noted that juries are not given unbridled discretion to award punitive damages under Mississippi law, but are subject to both instructions on the proper bases of awards and review by the trial and appellate courts.

In addition to citing several of the above cases, the Arizona Court of Appeals in *Olson v. Walker* found it significant that no governmental action resulted in the taking of defendant's property:

Obviously, a state or governmental interest is served when a wrongdoer is punished and others are deterred from similar conduct. However, for due process

to apply, the government must have exercised its power to further that interest, which, in this case, it did not do. This was a civil action between private parties. A jury awarded the punitive damages without any involvement by the state, other than that the award was obtained through the use of the state court system. This does not, in our view, amount to governmental action.

162 Ariz. at 182, 781 P.2d at 1023.

Petitioners and Amici are asking this Court to take away a State's right to control egregious conduct within its borders, and to overrule established precedent by adopting a position that no court—anywhere—has ever adopted. This Court should agree with the cases cited above in finding that the safeguards provided in criminal cases do not apply in private actions for punitive damages, and that the standards and safeguards already in place are sufficient to provide defendants with due process.

CONCLUSION

If the insurance consumer is to have any effective protection against corporate misconduct, the punitive damage remedy must be maintained and strengthened. Otherwise, (s)he is defenseless against a \$400 billion industry exempt from federal regulation and only ineffectively regulated by state governments.

The courts, and ultimately this Court, are the last best hope of the insurance consumer. As said over 100 years ago in *Goddard v. Grand Trunk Ry.*, 57 Me. 202 (1869): "If the courts will . . . let the doctrine of exemplary damages have its legitimate influence . . . great and growing evils will be very much lessened."

Due process in a private, state civil case involving punitive damages does not require anything more than the standards and judicial control already in place in the state courts. In addition, any newly found requirement that due process requires the amount of punitive damages to be limited to a mathematical formula will have the chaotic effect of immediately calling into question all compensatory awards for pain, suffering and emotional distress.

Respectfully submitted:

Roger O'Sullivan*
Mark Stachon
7007 E. Indian School Road
Scottsdale, Arizona 85251
(602) 947-4333

**Counsel of Record*

35
No. 89-1279

Supreme Court, U.S.
FILED
JUL 16 1990
JOSEPH F. SPANIOLO, JR.
CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989**

**PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner**

v.

**CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, AND EDDIE HARGROVE
Respondents**

**On Writ of Certiorari to the
Supreme Court of Alabama**

**BRIEF OF AMICUS CURIAE CONSUMERS UNION
OF U.S. IN SUPPORT OF RESPONDENTS**

**Andrew F. Popper
Counsel of Record
The American University
Washington College of Law
Washington, DC 20016
(202) 885-2604**

**Linda Lipsen, Esq.
Consumers Union of U.S.
2001 S Street, N.W.
Washington, DC 20009
(202) 462-6262**

July, 1990

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
STATEMENT OF CONSENT AND INTEREST OF THE AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	3
I. THERE IS NO TORT CRISIS JUSTIFYING EXTRAORDINARY INTERVENTION BY THE UNITED STATES SUPREME COURT.....	3
II. PUNITIVE DAMAGES ARE INTEGRAL TO OUR COMMON LAW HERITAGE AND ARE HIGHLY BENEFICIAL TO CONSUMER INTERESTS.	
A. Punitive Damages Are Part of Our Common Law Heritage.....	11
B. Punitive Damages Further the Rational State Interests of Up- grading the Quality of Consumer Goods and Services.....	14
C. Consumer Advantages from Punitive Damages Would Be Undercut by Man- dating a Fixed Formula or Propor- tionality Rule.....	20
D. Punitive Damages Exert Positive Market Pressure to Upgrade the Quality of Goods and Services..	26
III. ALABAMA PUNITIVE DAMAGES LAW COM- PORTS WITH CONSTITUTIONAL REQUIRE- MENTS OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS.	
A. The History of Substantive Due Process Mandates Restraint in Assessing State Programs that Affect Economic Interests.....	28
B. Substantive Due Process Is Not Offended by Juries Making Proper-	

ty Affecting Decisions in Punitive Damage Cases.....	37
C. Properly Instructed Jurors in Alabama Use Comprehensible Standards to Determine Punitive Damage Levels.....	40
D. There Is Rational Review of Punitive Damage Awards.....	45
E. Tort Reform Legislation in 1987 Refined Punitive Damages Law and Reflects the Social and Economic Policy of the State.....	47
F. The Alabama System for Determining Punitive Damages Comports with the Requirements of Procedural Due Process.....	48
G. Punitive Damages Are Not Criminal Sanctions Entitled to Special Procedural Protections.....	57
IV. VICARIOUS LIABILITY ASSURES ACCOUNTABILITY AND COMPORTS WITH DUE PROCESS.....	60
CONCLUSION.....	64

TABLE OF AUTHORITIES

CASES:

<u>Aetna Life Ins. Co. v. Lavoie</u> , 470 So. 2d 1060 (Ala. 1984).....	41
<u>Alabama Power Co. v. Hussey</u> , 291 Ala. 586, 285 So. 2d 92 (1973).....	43
<u>American Society of Mechanical Engineers v. Hydrolevel</u> , 456 U.S. 556 (1981).....	59, 60, 62
<u>Badgett v. McDonald</u> , 304 So. 2d 228 (Ala. Civ. App. 1974).....	40
<u>Bankers Life & Casualty Co. v. Crenshaw</u> , 486 U.S. 71 (1988).....	passim
<u>Bell v. Preferred Assurance Society of Montgomery</u> , 320 U.S. 238 (1943).....	23
<u>Bishop v. Wood</u> , 426 U.S. 341 (1976).....	48
<u>Boddie v. Connecticut</u> , 401 U.S. 371 (1971).....	30, 47
<u>Bowers v. Hardwick</u> , 478 U.S. 186 (1986).....	30, 31
<u>Brandt v. Board of Co-Op Educ.</u> , 820 F.2d 41 (2d Cir. 1987).....	48
<u>Brock v. Roadway Express</u> , 481 U.S. 252 (1987).....	49
<u>Brotherhood of Elec. Workers v. Foust</u> , 442 U.S. 42 (1979).....	37
<u>Brown v. Board of Education</u> , 347 U.S. 483 (1953).....	6

<u>Browning-Ferris Indus. v. Kelco Disposal, Inc.</u> , 109 S. Ct. 2909 (1989)....	passim
<u>Burroughs Co. v. Hall Affiliates</u> , 423 So. 2d 1348 (Ala. 1982).....	44
<u>Campus Sweater & Sportswear Co. v. M.V. Kahn Construction Co.</u> , 515 F. Supp. 64 (D.S.C. 1979), <u>aff'd</u> , 644 F.2d 877 (2d Cir. 1981).....	13,14,19
<u>Carey v. Population Services Int'l</u> , 431 U.S. 678 (1977).....	30
<u>Cleveland Board of Educ. v. Loudermill</u> , 470 U.S. 532 (1985).....	49
<u>Commodore Corp. v. Bailey</u> , 393 So. 2d 467 (Miss. 1981).....	39
<u>Courtesy Ford Sales, Inc. v. Clark</u> , 425 So. 2d 1075 (Ala. 1983).....	44
<u>Day v. Woodworth</u> , 54 U.S. (13 How.) 363 (1851).....	7,9
<u>Day-Brite Lighting, Inc. v. Missouri</u> , 342 U.S. 421 (1952).....	28
<u>DeShaney v. Winnebago County DSS</u> , 109 S. Ct. 998 (1989).....	31,32
<u>Devlin v. Kearney Mesa AMC/Jeep Renault</u> , 155 Cal. App. 3d 381, 202 Cal. Rptr. 204 (1984).....	19
<u>Doroszka v. Lavine</u> , 111 Conn. 575, 150 A. 692 (1930).....	13
<u>Dred Scott v. Sandford</u> , 60 U.S. (19 How.) 393 (1857).....	33,34

<u>Dun & Bradstreet v. Greenmoss Builders, Inc.</u> , 472 U.S. 749 (1985).....	11
<u>Duncan v. Louisiana</u> , 391 U.S. 145 (1968).....	36
<u>Evans v. Philadelphia Transportation Co.</u> , 418 Pa. 567, 212 A.2d 440 (1965)....	12
<u>Ex parte Smith</u> , 412 So. 2d 1222 (1982).....	40,44
<u>Fleet & Semple v. Hollenkemp</u> , 52 Ky. (13 B. Mon. 219) 175 (1852).....	9
<u>Focht v. Rabada</u> , 217 Pa. Super. 35, 268 A.2d 157 (1970).....	12
<u>Ford Motor Credit Co. v. Washington</u> , 420 So. 2d 14 (Ala. 1982).....	43
<u>Foster v. Floyd</u> , 276 Ala. 428, 163 So. 2d 213 (1964).....	20,23
<u>Germanio v. Goodyear Tire & Rubber Co.</u> , 732 F. Supp. 1297 (D.N.J. 1990).passim	
<u>Gertz v. Robert Welch, Inc.</u> , 418 U.S. 323 (1974).....	passim
<u>Giaccio v. Pennsylvania</u> , 382 U.S. 399 (1966).....	11,35,50
<u>Gleason v. Seaboard Airline Arco</u> , 278 U.S. 349 (1929).....	60
<u>Green Oil Co. v. Hornsby</u> , 539 So. 2d 218 (Ala. 1989).....	41,43
<u>Griswold v. Connecticut</u> , 381 U.S. 479 (1965).....	30

<u>Gryc v. Dayton-Hudson</u> , 297 N.W.2d 727 (Minn.), <u>cert. denied</u> , 449 U.S. 921 (1980).....	14
<u>Gulf Atl. Life Ins. Co. v. Barnes</u> , 405 So. 2d 916 (Ala. 1981).....	37
<u>Hammond v. City of Gasden</u> , 493 So. 2d 1374 (Ala. 1986).....	43, 53
<u>Hicks v. Herring</u> , 246 S.C. 429, 144 S.E. 2d 151 (1965).....	12
<u>Huckle v. Money</u> , 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763).....	9
<u>J. Truett Payne Co. v. Jackson</u> , 281 Ala. 426, 203 So. 2d 443 (1967).....	41
<u>Jolley v. Puregro Co.</u> , 94 Idaho 702, 496 P.2d 939 (1972).....	12
<u>Kelly v. Robinson</u> , 479 U.S. 36 (1986)...	56
<u>Lanese v. Carlson</u> , 32 Conn. Supp. 163, 344 A.2d 361 (1975).....	13
<u>Lassiter v. Dept. of Social Services</u> , 452 U.S. 18 (1981).....	48
<u>Lincoln Union v. Northwestern Co.</u> , 335 U.S. 527 (1949).....	28
<u>Linsley v. Bushnell</u> , 15 Conn. 225 (1842).....	9, 19
<u>Lochner v. New York</u> , 198 U.S. 45 (1905).....	27
<u>Louis Pizitz Dry Goods Co. v. Yeldell</u> , 274 U.S. 112 (1927).....	59

<u>Loving v. Virginia</u> , 388 U.S. 1 (1967)...	30
<u>Man v. Raymark Indus.</u> , 728 F. Supp. 1461 (D. Haw. 1989).....	passim
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976).....	47, 52, 53
<u>Merrells v. The Tariff Mfg. Co.</u> , 10 Conn. 388 (1835).....	9
<u>Meyer v. Nebraska</u> , 262 U.S. 390 (1923).....	30
<u>Miller v. California</u> , 413 U.S. 15 (1973).....	54
<u>Milwaukee & St. Paul Ry. v. Arms</u> , 91 U.S. 489 (1875).....	9
<u>Minneapolis & St. Louis Ry. v. Beckwith</u> , 129 U.S. 26 (1889).....	10
<u>Missouri Pacific Ry. Co. v. Humes</u> , 115 U.S. 512 (1885).....	9
<u>Mobile Dodge, Inc. v. Waters</u> , 404 So. 2d 26 (Ala. 1981).....	41, 44
<u>Moore v. East Cleveland</u> , 431 U.S. 494 (1977).....	29
<u>Nebbia v. New York</u> , 291 U.S. 502 (1934).....	28
<u>Newport v. Fact Concerts</u> , 453 U.S. 247 (1981).....	37
<u>Oppenhuizen v. Wennersten</u> , 2 Mich. App. 288, 139 N.W. 2d 765 (1965).....	12

<u>Pan Am Petroleum v. Hardy</u> , 370 S.W.2d 904 (Tex. Civ. App. 1963).....	13
<u>Paul v. Davis</u> , 424 U.S. 693 (1976).....	48
<u>Phillips v. Commissioner</u> , 283 U.S. 539 (1931).....	48
<u>Pierce v. Society of Sisters</u> , 268 U.S. 510 (1925).....	30
<u>Puppe v. A.C.S., Inc.</u> , 733 F. Supp. 1355 (D.N.D. 1990).....	23,35,50
<u>Racich v. Celotex Corp.</u> , 887 F.2d 393 (2d Cir. 1989).....	51
<u>Ricketts v. Pennsylvania R.R. Co.</u> , 153 F.2d 757 (2d Cir. 1946).....	60
<u>Ridout's-Brown Service, Inc. v. Holloway</u> , 397 So. 2d 125 (Ala. 1981).....	43
<u>Roe v. Wade</u> , 410 U.S. 113 (1973).....	30
<u>St. Louis, I.M. & S. Ry. v. Taylor</u> , 210 U.S. 281 (1908).....	59
<u>St. Louis, Iron Mt. & So. Ry. v. Williams</u> , 251 U.S. 63 (1919).....	11
<u>San Francisco Civil Serv. Assn. v. Superior Court of Marin County</u> , 16 Cal. 3d 46, 127 Cal. Rptr. 131, 544 P.2d 1331 (1976).....	57
<u>Shelley v. Kraemer</u> , 334 U.S. 1 (1948)...	47
<u>Silkwood v. Kerr-McGee Corp.</u> , 464 U.S. 238 (1984).....	56
<u>Smith v. Wade</u> , 461 U.S. 30 (1983)...	passim

<u>Snowden v. Osborne</u> , 269 So. 2d 858 (Miss. 1972).....	13
<u>Standard Life v. Veal</u> , 354 So. 2d 239 (Miss. 1977).....	15
<u>Standard Oil Co. v. Missouri</u> , 224 U.S. 270 (1911).....	21
<u>Story Parchment v. Patterson Parchment Paper</u> , 282 U.S. 555 (1930).....	20
<u>Taylor v. Louisiana</u> , 419 U.S. 522 (1975).....	36
<u>Treadwell Ford v. Leek</u> , 272 Ala. 544, 133 So. 2d 24 (1961).....	64
<u>Tull v. United States</u> , 481 U.S. 12 (1987).....	21
<u>United Services Auto Assn. v. Wade</u> , 544 So. 2d 906 (Ala. 1989).....	44
<u>United States v. Carolene Products Co.</u> , 304 U.S. 144 (1938).....	29,30
<u>Walker v. Sheldon</u> , 10 N.Y.2d 401, 179 N.E.2d 497 (1961).....	13,15
<u>Waste Disposal v. Stewart</u> , 432 So. 2d 1255 (Ala. 1983).....	44
<u>West Coast Hotel v. Parrish</u> , 300 U.S. 379 (1937).....	28
<u>Wilkes v. Wood</u> , 98 Eng. Rep. 489 (K.B. 1763).....	9
<u>Williamson v. Lee Optical</u> , 348 U.S. 483 (1955).....	28

Wilmington Star Mining Co. v. Fulton, 205
U.S. 60 (1907).....59

Witherspoon v. Illinois, 391 U.S. 510
(1968).....54

STATUTES:

42 U.S.C. § 2011 et seq. (1976 ed. and
Supp. V).....56

Ala. Code §§ 6-11-20 through 6-11-30
(Supp. 1988).....45

Ala. Pattern Jury Instructions 11.03
(1974).....41

TREATISES:

B. Nicholas, Roman Law 210 (1962)

Prosser & Keaton on Torts 13 (5th ed.
1984).....59

D. Pugsley, The Roman Law of Property and
Obligations 31 (1972).....10

Rehnquist, The Supreme Court--How It Was,
How It Is (William Morrow & Co.
1987).....27,33

RESTATEMENTS:

Restatement (Second) of Torts § 908
(1979).....12,57

PERIODICALS:

Borowsky & Nicolaisen, Punitive Damages in
California: The Integrity of Jury
Verdicts, 17 U.S.F. L. Rev. 147
(1983).....20,38

Burrow & Collins, Insurance Crisis--Texas
Style: The Case for Insurance Reform,
18 St. Mary's L.J. 759 (1987).....3

Daniels, Punitive Damages: Storm on the
Horizon?, Preliminary Report of the
Punitive Damages Project Study, Am.
Bar Found. Fellows Seminar, ABA Mid-
year Meeting, Baltimore, Md. (February
8, 1986).....passim

Daniels & Martin, Myth and Reality in
Punitive Damages, ABF Working Paper
8911, Am. Bar Found. 63 (1990)..passim

Demarest & Jones, Exemplary Damages as an
Instrument of Social Policy: Is Tort
Reform in the Public Interest, 18 St.
Mary's L.J. 797 (1987).....18,36

Hirsch, Strict Liabilities: A Response to
Gruenberg-Silberg Conflict Regarding
Insurance Litigation Awards, 7 S.W.U.
L. Rev. 310 (1975).....16

Kindregan & Schwartz, The Assault on the
Captive Consumer: Emasculating the
Common Law of Torts in the Name of
Tort Reform, 18 St. Mary's L.J. 673
(1987).....3

Landes & Posner, New Light on Punitive
Damages, 33 Reg., Oct. 1986.....3,4,25

Levine, Demonstrating and Preserving the
Deterrent Effect of Punitive Damages
and Insurance Bad Faith Actions, 13
U.S.F. L. Rev. 613 (1979).....16,17

Morris, Punitive Damages in Tort Cases, 44
Harv. L. Rev. 1173 (1931).....19

Petersen, Sarma & Shanley, "Punitive Damages: Empirical Findings" (RAND, Institute for Civil Justice 1987)....	6
Peterson, <u>Punitive Damages: Preliminary Findings</u> , The RAND Corporation, Institute for Civil Justice (1985).....	5
Prentice, "Reforming Punitive Damages: The Judicial Bargaining Concept," 7 Review of Litigation 113 (1988).....	6
Comment, <u>Punitive Damages: An Appeal for Deterrence</u> , 61 Nev. L. Rev. 651 (1982).....	20
Note, <u>Punitive Damages and the Reasonable Relation Rule: A Study in the Frustration of Purpose</u> , 9 Pac. L.J. 823 (1979).....	20
Owen, <u>Punitive Damages and Product Liability Litigation</u> , 74 Mich. L. Rev. 1258 (1976).....	10,13,19
Rehnquist, <u>The Notion of a Living Constitution</u> , 54 Tex. L. Rev. 693 (1976)..	34
Reisberg, <u>In Defense of Punitive Damages</u> , 55 N.Y.U. L. Rev. 303 (1980).....	6
Note, <u>The Vitality of the Doctrine of Punitive Damages in Maine</u> , 35 Me. L. Rev. 447 (1983).....	10
Wheeler, <u>The Constitutional Case for Reforming Punitive Damages Procedures</u> , 69 Va. L. Rev. 269 (1983).....	48

No. 89-1279

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, AND EDDIE HARGROVE
Respondents

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF AMICUS CURIAE CONSUMERS UNION
OF U.S. IN SUPPORT OF RESPONDENTS

STATEMENT OF CONSENT AND
INTEREST OF THE AMICUS CURIAE

This brief is filed with the consent of the parties.

The Consumers Union of United States is a non-profit membership organization founded in 1936. It engages in consumer advocacy before the executive, judicial, and legislative branches of government. Consumers Union is committed to preserving the role of punitive damages and ensuring a responsive and consumer-oriented tort system. Without such a system, Consumers Union members will be denied a legal remedy that serves to increase efficiency, deter the production of unsafe products, and provide incentives to improve insurance and other professional services. Further, Consumers Union members would be harmed if corporate accountability inherent in vicarious liability was modified or lessened.

SUMMARY OF ARGUMENT

There is insufficient data to conclude that a tort/punitive damage crisis exists at a level appropriate to justify unprecedented intrusion into state tort law, stretching and perhaps exceeding the limits of due process.

There are multiple and beneficial state objectives critical to the interests of consumers furthered by punitive damages nationally and in Alabama. The procedures for determining those damages require a full trial and compulsory post-trial review. Jury instructions in this case reflected accurately Alabama law and articulate the proper goals of punishment and deterrence. As such, the Alabama system for determining punitive damages conforms with the requirements of procedural and substantive due process.

ARGUMENT

I

THERE IS NO TORT CRISIS JUSTIFYING EXTRAORDINARY INTERVENTION BY THE UNITED STATES SUPREME COURT.

During the last ten years the tort system--and particularly the various systems for determining punitive damages--has come under close scrutiny. (See Appendix A.) "Tort reformers" who contend that the system has become unbalanced and weighted unduly in favor of plaintiffs spar with various plaintiff and consumer groups who defend the tort system and seek to make it function more effectively. The role of this Court has been limited to declaring that the excessive fines clause of the Eighth Amendment is unavailable as a means of reviewing punitive damages. See Browning-Ferris Indus. v. Kelco Disposal, 109 S. Ct. 2909, 2913-20 (1989); Crenshaw, 486 U.S. 71, 76-78 (1988).

In the present case, this Court has

agreed to consider whether the system for determining punitive damages in the state of Alabama comports with the constitutional requirement of due process. It appears a motivation to consider this matter comes from the belief that punitive damages nationally are "out of control," depriving parties of fundamental fairness. Browning-Ferris, 109 S. Ct. at 2923 (Brennan, J., concurring), Bankers Life & Casualty v. Crenshaw, 436 U.S. at 87-88 (O'Connor, J., concurring).

Although there is a growing body of literature in the field of punitive damages, the assessment is not complete nor is a clear conclusion emerging. A recent comprehensive study funded by the American Bar Foundation concludes that there is no punitive damage crisis based on a careful evaluation of 25,000 jury verdicts and related statistics. Daniels & Martin, Myth and Reality in Punitive

Damages, ABF Working Paper 8911, Am. Bar Found. 63 (1990) [Daniels & Martin 1990]. Although the amici in this case assert to the contrary, there is no clear and unequivocal data suggesting a national crisis sufficient to compel intrusive judicial intervention, stretching the limits of the due process clause, to address a problem that may well not exist.¹

A 1986 study of over thirty jurisdictions in ten states from 1981-1985 asserts that punitive damages were not routinely awarded. Daniels, Punitive Damages: Storm on the Horizon?, Preliminary Report of the Punitive Damages Project Study, Am.

¹A diverse group of scholars have written that whatever problems exist in the tort field, punitive damages play no substantial role. Landes & Posner, New Light on Punitive Damages, 33 Reg. October 1986; Burrow & Collins, Insurance Crisis--Texas Style: The Case for Insurance Reform, 18 St. Mary's L.J. 759, 763-65 (1987); Kindregan & Schwartz, The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Tort Reform, 18 St. Mary's L.J. 673, 695 (1987).

Bar Found. Fellows Seminar, ABA Midyear Meeting, Baltimore, Md. (February 8, 1986) [Daniels 1986].

The study found that punitive damage awards in cases where plaintiff won a money judgment ranged from 0.0 percent of all reported verdicts in four sites to a high of 21.6 percent in one site. For two-thirds of the surveyed sites, the percentage of reported verdicts in which plaintiff won money was less than ten percent. In New York City, only 1.6 percent of awards included punitives, 2.2 percent in Cook County, Illinois (which includes Chicago), and 8.6 percent in Los Angeles County, California. Daniels 1986 at 11. The Landes & Posner study, supra note 1, of federal courts from 1982 to November of 1984 found four punitive damage awards upheld out of 172 cases, and of 359 product liability, punitives were allowed in only two percent. A RAND study of civil jury

trials in San Francisco, California, and Cook County, Illinois, between 1960-1984 found only eight awards of punitive damages in product liability cases. Peterson, Punitive Damages: Preliminary Findings, The RAND Corporation, Institute for Civil Justice (1985).

Critics of punitive damage awards distort statistical images through the use of numerical averages. For example, in the RAND Cook County study, the average award was \$137,350, but 87.7 percent of the cases had awards lower than the average, with a median of \$8,800. Medians are the appropriate measure since they reflect the typical award or the dollar amount for the case at the 50th percentile when awards are listed from lowest to highest in ascending order. Daniels & Martin 1990 at 42-43; Daniels 1986 at 13. The fact is that "[t]he predicted unmanageability of punitive damages has failed to appear.

Experience has shown that judicial oversight of punitive damages awards has greatly reduced the risk of substantial over-deterrence." Reisberg, In Defense of Punitive Damages, 55 N.Y.U. L. Rev. 303, 345 (1980). There are two juried empirical and systematic studies of punitive damages, and neither supports the proposition that there is a national crisis in punitive damages.²

There are situations where judicial action is justified based on stark principles of fairness, where empirical, sociological, or economic data compels a response, e.g., Brown v. Board of Education, 347 U.S. 483 (1953). Such data does not

²Daniels & Martin 1990 and Petersen, Sarma & Shanley, Punitive Damages: Empirical Findings" (RAND, Institute for Civil Justice, 1987). Prentice, Reforming Punitive Damages: The Judicial Bargaining Concept, 7 Review of Litigation 113, 123 (1988). ("The attack on punitive damages is part of a wide-ranging, well organized attack on the current tort system. . . . There is substantial evidence that the claims of runaway punitive damages are greatly exaggerated.")

yet exist in the area of punitive damages. Nevertheless, the claim is made that somehow in the last few years juries receiving the same information they have received since Day v. Woodworth, 54 U.S. (13 How.) 363 (1851), have engaged in irresponsible behavior. Bluntly, "[t]here is no systematic empirical evidence that juries are excessively plaintiff oriented." Daniels & Martin 1990 at 9.

This Court must avoid scrupulously the mischaracterizations that have been put forward regarding the state of punitive damages.

Horror stories and their implications are presented as if they are representative of what is typical, describing a system run amuck and in need of fundamental and immediate change. Such vivid stories typically distort the actual facts of situations described. . . . The stories are meant to foster the acceptance of a particular characterization of the civil justice system and punitive damages. . . . The view is portrayed as one so obvious and common-sensical that no reasonable person could disagree. . . .

Daniels & Martin 1990 at 22. Press kits

and news releases have become the tools of jurisprudential debate, rather than case analysis and synthesis of jury verdict statistics. Daniels & Martin 1990 at 24. However, an analysis of the hard data put forward in support of tort reform and modification of punitive damages provides "little if any, reliable evidence on the punitive damage system." Daniels & Martin 1990 at 29.

In general, then, it does not appear from our data that punitive damages are routinely awarded in the sites studied, contrary to what would be expected in light of the rhetoric of crisis and reform. Nor were punitive damages typically given in amounts that would "boggle the mind." Punitive damages were awarded infrequently, and when they were awarded the amount was typically modest.

Daniels & Martin 1990 at 44.

In the absence of unequivocal data suggesting a crisis in the punitive damage area, judicial intervention can be justified only if the Alabama method for determining punitive damages at the time this

case was decided violates due process.

II

PUNITIVE DAMAGES ARE INTEGRAL TO OUR COMMON LAW HERITAGE AND ARE HIGHLY BENEFICIAL TO CONSUMER INTERESTS.

A. Punitive Damages Are Part of Our Common Law Heritage.

In Day, 54 U.S. at 371, this Court found that punitive damages are proper, so much so that argument as to their validity was not tolerated.³ In Missouri Pacific Ry. v. Humes, 115 U.S. 512, 511 (1885), this Court approved the use of punitive damages to "blend together the interests

³Common law affirmation of punitive damages can be traced back centuries through the Magna Carta, see Browning-Ferris, 109 S. Ct. 2909, 2919-20 (1989), but usually begins with a look at Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763), and Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763). The nineteenth century view of punitive damages was that the doctrine was "too well settled now to be shaken, that exemplary damages may in certain cases be assessed." Milwaukee & St. Paul Ry. v. Arms, 91 U.S. 489, 492 (1875); Fleet & Semple v. Hollenkemp, 52 Ky. (13 B. Mon. 219) 175, 180 (1852); Merrells v. The Tariff Mfg. Co., 10 Conn. 388 (1835); Linsley v. Bushnell, 15 Conn. 225 (1842).

of society and the aggrieved individual." Constitutionality of punitive damages was considered in Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 36 (1889), holding: "The imposition of punitive or exemplary damages . . . cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law." Looking to the legal systems in the United States, Great Britain, and even to Roman law, it is evident that punitive damages are a fundamental part of our jurisprudence.⁴

More recently, this Court allowed the use of punitive damages in the civil rights and defamation areas even though such damages might have a chilling effect on speech or intimidating effect on cer-

⁴D. Pugsley, The Roman Law of Property and Obligations 31 (1972); B. Nicholas, Roman Law 210 (1962); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1262, n.17 (1976); The Vitality of the Doctrine of Punitive Damages in Maine, 35 Me. L. Rev. 447, 451 (1983).

tain law enforcement functions.⁵ This Court has not engaged in a due process review of punitive damage award amounts.⁶ The absence of systemic review may be because "the availability of punitive damages in civil cases was well known to the framers of the Fourteenth Amendment, as it had been for centuries." Germanio v. Goodyear Tire & Rubber, 732 F. Supp. 1297, 1303 (D.N.J. 1990).

B. Punitive Damages Further the Rational State Interests of Upgrading the Quality of Consumer Goods and Services.

Punitive damages are vital to the

⁵Smith v. Wade, 461 U.S. 30 (1983), permitted punitive damages in 42 U.S.C. § 1983 (1982) actions and affirmed the validity of punitive damages as a deterrent to misconduct. 461 U.S. at 36-37 n.5; and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), upheld the use of punitive damages despite the potential effect on speech. See also Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

⁶But see St. Louis, Iron Mt. & So. Ry. v. Williams, 251 U.S. 63, 66-67 (1919), requiring courts to guard against grossly excessive verdicts, and Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966), holding invalid a system that provides jurors no guidance on awards.

protection of consumers. With the minimum of transaction costs, they achieve the dual goals of punishment of specific actors and industrywide deterrence for future misconduct, and creation of incentives to upgrade the quality of goods and services.⁷ Individuals who suffer at the hands of others whose behavior is sufficiently bad to be characterized as intentional or wanton misconduct are in no way winners of some bizarre lottery. The destruction of family life, the trauma of

⁷Beyond punishment and deterrence, punitive damages provide resources to aggrieved plaintiffs who have been thrust into an abnormal risk category. See, e.g., Evans v. Philadelphia Transportation Co., 418 Pa. 567, 212 A.2d 440 (1965); Focht v. Rabada, 217 Pa. Super. 35, 268 A.2d 157 (1970); Restatement (Second) of Torts § 908 (1979). A few states are straightforward in discussing the functions of punitive damages beyond punishment and deterrence: Hicks v. Herrington, 246 S.C. 429, 144 S.E.2d 151, 155 (1965), allows punitive damages to vindicate a private right. Jolley v. Puregro Co., 94 Idaho 702, 496 P.2d 939, 947 (1972), permits punitive damages for "rectification of wrongs"; Oppenhuizen v. Wennersten, 2 Mich. App. 288, 139 N.W.2d 765 (1965), permits punitive damages to address embarrassment.

protracted litigation, the displacement of emotional equilibrium, and various costs⁸ pertaining to pursuing legal claims can be addressed by a punitive damage award. Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1257, 1296-98 (1976).

It is argued regularly that compensatory damages cover the needs of injured persons and deter future misconduct. Such arguments are devoid of empirical support.⁹ Punitive damages are often awarded

⁸A very few states permitted punitive damages for the purpose of assisting with attorneys fees. Lanese v. Carlson, 32 Conn. Supp. 163, 344 A.2d 361, 364 (1975); Doroszka v. Lavine, 111 Conn. 575, 578, 150 A. 692 (1930). Other jurisdictions allow punitive damages for "inconvenience, reasonable attorneys fees, and other losses too remote to be considered under actual damages." Pan Am Petroleum v. Hardy, 370 S.W.2d 904, 908 (Tex. Civ. App. 1963). Other states recognize that punitive damage awards encourage private persons to bring wrongdoers before the court, e.g., Snowden v. Osborne, 269 So. 2d 858 (Miss. 1972).

⁹Walker v. Sheldon, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499 (1961); Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co., 515 F. Supp. 64, 104-05 (D.S.C. 1979), aff'd, 644 F.2d (Cont'd)

after a multi-year pattern of misconduct, interspersed with various compensatory damage awards which did not deter the defendant, prompting the Supreme Court of Minnesota to conclude that punitive damages are particularly effective in preventing repetitive forms of misconduct. Gryc v. Dayton-Hudson, 297 N.W.2d 727 (Minn.), cert. denied, 449 U.S. 921 (1980).

In the state of New York, the deterrence function of punitive damages is well recognized:

877 (2d Cir. 1981), holding that punitive damages deter manufacturers from misconduct, encourage the production of safer products, and "serve as a type of private revenge which is carried out in the courts rather than through duels or in back alleys." The court held further "there is no exact monetary standard which can be used as a measure. . . . There is no formula for punitives as the amount to be awarded is peculiarly within the judgment and discretion of the jury, subject to the supervisory powers of the trial judge over jury verdicts. . . . The main things to be considered are the character of the tort committed, the punishment which should be meted out therefore, and the ability of the wrongdoer to pay." 515 F. Supp. at 105-06.

A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Walker v. Sheldon, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499 (1961).

The need for punitive damages in the insurance industry is undeniable.

If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that the claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely.

Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 248 (Miss. 1977). In insurance rela-

tionships the potential of punitive damages provides consumers with some force at the bargaining table.

[T]he relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position. The availability of punitive damages is thus compatible with the recognition of insurers' underlying public obligation and reflects an attempt to restore balance in the contractual relationship.

Hirsch, Strict Liability: A Response to the Gruenberg-Silberg Conflict Regarding Insurance Litigation Awards, 7 S.W.U. L. Rev. 310, 326 (1975).

These benefits are of particular import since state insurance regulation has not provided a significant countervailing force to insurance industry power. Insurance regulation has been characterized by "apathetic administrative agencies and lethargic legislative bodies providing little discipline to an industry that has enormous power over the well-being of American consumers." Levine, Demonstrat-

ing and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions, 13 U.S.F. L. Rev. 613, 615 (1979). While it may take years to promulgate an insurance regulation, there is generally a stunning and prompt reaction to a punitive damage award in the insurance industry. Punitive damage awards against insurance companies prompt action and stern admonition to exercise greater care in dealing with consumers, eliminate fraudulent practices, develop training programs for employees, and engage in oversight of staff. Levine, supra, at 625-27.

An opinion from this Court that dilutes the punitive damage system would have a deleterious effect on the benefits derived from punitive damage awards and frustrate the ability of states to achieve these rational objectives.

C. Consumer Advantages from Punitive Damages Would Be Undercut by Mandating a Fixed Formula or Proportionality Rule.

A decision that compels the states to establish fixed ratios for punitive damages would allow business interests to calculate easily the proper sum to be set aside to accommodate judgments. This would have a disastrous effect on the deterrent value of punitive damages.

Conscious wrongdoers must know they cannot estimate the cost of their misdeeds by coldly calculating the number of dead or injured and their resulting limited compensatory expenses. They must know that their financial existence may be threatened by the evil they contemplate.

Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797, 833 (1987). Generally, courts favor an individualized punitive damage system not bound by mathematical equations.

The admonitory function of punitive damages does not lend itself to formulation. . . . The refusal to speci-

fy a ratio is due to the need to individualize punitive damage verdicts. One must look to behavior, not to results, to determine the need to admonish and . . . the amount which must be awarded. . . .

Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co., 515 F. Supp. 64, 106 (D.S.C. 1979), aff'd, 644 F.2d 877 (2d Cir. 1981).¹⁰ Some courts¹¹ have struggled to find a proper calculation mechanism but have come up empty handed:

Frankly, we are unable to find that formula. Instead of making a mathematical breakthrough we discovered what everyone probably already knows: the formula does not exist. And, we have concluded, that is properly so.

Accordingly, we examine the usual factors recited by appellate courts when reviewing punitive damage awards, applying those factors in the custom-

¹⁰See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1180-81 n.9 (1931), rejecting proportional ratios as "arbitrary"; Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1258, 1316 (1976), rejecting ratios due to their failure to take into account appropriate damage factors.

¹¹Linsley v. Bushnell, 15 Conn. 225, 235 (1842), "there is no rule of damages fixed by law" to accommodate punitive damages.

ary manner to reach what we believe is a decision consistent with precedent.

Devlin v. Kearney Mesa AMC/Jeep Renault, 155 Cal. App. 3d 381, 202 Cal. Rptr. 204, 209 (4th Dist. 1984). Like California, Alabama imposes no specific formula for punitive damages.¹²

This Court has suggested that a plaintiff's entitlement to the "recovery of uncertain damages" is not flawed constitutionally, though defendants are entitled to certainty in ascertaining what conduct is wrong.¹³ Story Parchment v. Patterson Parchment Paper, 262 U.S. 555,

¹²See Foster v. Floyd, 276 Ala. 428, 163 So. 2d 213 (1964); Note, Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose, 9 Pac. L.J. 823, 852 (1979); Borowsky, Punitive Damages in California: The Integrity of Jury Verdicts, 17 U.S.F. L. Rev. 147, 164-65 (1983), condemning the reasonable relation rule as a decisional pretext.

¹³A ratio rule "undermines the deterrent effect of punitive damages by stressing the actual resulting harm rather than the social undesirability of the defendant's conduct." Comment, Punitive Damages: An Appeal for Deterrence, 61 Neb. L. Rev. 651, 676 (1982).

562 (1930). Recently, this Court characterized punitive damages as a "legal remedy that is not a fixed fine." Tull v. United States, 481 U.S. 412, 423 n.7 (1987). Tull follows well established precedent that defendants have no particular entitlement to a fixed maximum in cases where punishment is in the form of a fine. Standard Oil Co. of Indiana v. Missouri, 224 U.S. 270, 286 (1911).

The value of not being bound to a set formula is apparent when a defendant causes only minor compensatory losses but acts with an intention, vengeance, or hostility requiring substantial punishment. In such cases, to use a multiple of compensatory damages is arbitrary. The quest for formulae and limits stems from the perception that punitive damage awards are wildly disproportionate to compensatory damages. On the average, in those few cases where punitive damages are awarded, for

every dollar of compensatory damages, about \$1.50 is awarded for punitives, with the ratio between punitive damages and compensatory damages ranging from 0.67 to approximately 3.6. Daniels & Martin 1990 at 56-60. Were a state or a court to adopt a trebling mechanism, as suggested by some of the amici, then the actual dollars spent on punitive damages may increase substantially.

A directive to impose fixed multiples or other means of ensuring certainty stems also from the perception that jury instruction is "standardless." In the present case the jury was told to consider punishment, deterrence, and the proportional relationship between the wrongfulness of the defendant's act and the award. Reviewing a similar situation in North Dakota, Judge Van Sickle held as follows:

This court is not convinced that a jury's determination of punitive damage awards is "standardless." The standard the jury applies in determin-

ing whether to grant an award is the culpability of the defendant. To determine the amount of the award, the jury determines the amount needed to deter such behavior in the future, the amount it takes to make certain types of conduct unprofitable.

Puppe v. A.C. & S., Inc., 733 F. Supp. 1355, 1362 (D.N.D. 1990).

As a matter of its substantive law, Alabama has decided that "[p]unitive damages need bear no particular mathematical relationship to actual damages." Foster v. Floyd, 276 Ala. 428, ___, 163 So. 2d 213, 217 (1964), citing Bell v. Preferred Life Assurance Society of Montgomery, 320 U.S. 238 (1943). Unless this Court wishes to perform the role of the Alabama state legislature, it must avoid tampering with the decisions of that body.

In summary, there is ample data to conclude that there is no crippling tort crisis, that punitive damages provide a significant benefit in deterring unacceptable behavior, and that remedies such as

ratios would be destructive to the rational and reasonable objectives of states such as Alabama. A judicial directive limiting punitive damages would be an unprecedented intrusion on the right of the state to accomplish rational state objectives.

D. Punitive Damages Exert Positive Market Pressure to Upgrade the Quality of Goods and Services.

Recently, it has been contended that punitive damages have an adverse effect on the competitive posture of the United States. Browning-Ferris, 109 S. Ct. at 2924 (O'Connor, J., dissenting); Daniels & Martin 1990 at 22. Quite simply, there is no solid empirical basis to support the proposition.

It seems incredulous to assert that a system that condemns products or services produced fraudulently, in a grossly negligent manner, or in a way that comports with intentional misconduct is destructive

of the competitive posture of the United States. In Man v. Raymark Indus., 728 F. Supp. 1461 (D. Haw. 1989), the court considered whether punitive damages have a detrimental effect and prevent manufacturers from developing new products due to their fear of "uncertain liability."

This court respectfully suggests that if that is indeed what is happening [to proposed new products], then punitive damages are accomplishing a worthy goal. In this respect it is important to remember that punitive damages are awarded for some form of outrageous misconduct, never for simple negligence. A manufacturer who vigilantly and honestly tests his product can have no fear of punitive damages.

728 F. Supp. at 146 n.7.

A companion attack is that punitive damages divert substantial resources away from research and development. This argument borders on the absurd for two reasons. First, there is only a miniscule level of direct or real dollar loss from punitive damages. Landes & Posner, supra; Daniels & Martin 1990 at 33-35. Second,

the vast majority of punitive damage awards do not involve consumer goods such as pharmaceutical products; rather, they involve personal violence, false arrest, malicious behavior, or intentional misconduct. Daniels & Martin 1990 at 48, 50, and 56. It seems most unlikely that U.S. problems in international competitive markets stem from punitive damage awards that deter fraud or punish intentional wrongdoers.

III

ALABAMA PUNITIVE DAMAGES LAW COMPORTS WITH CONSTITUTIONAL REQUIREMENTS OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

A. The History of Substantive Due Process Mandates Restraint in Assessing State Programs that Affect Economic Interests.

Probing substantive due process review is reserved for constitutional assessments of fundamental entitlements. A system that allows punitive damage awards affecting property interests need

satisfy only the rational basis test.

Where the substance of a law is challenged under the due process clause, the starting point for analysis should be Lochner v. New York, 198 U.S. 45 (1905), one of the "most ill-starred decisions that [the Court] ever rendered."¹⁴ The majority declared unconstitutional a New York workplace safety law. The Court balanced public safety and freedom of contract and, coming to a result opposite that of New York lawmakers, used substantive due process to assert their will.¹⁵ For the next thirty years the Court used

¹⁴Rehnquist, The Supreme Court--How It Was, How It Is at 205.

¹⁵Justice Holmes dissented, admonishing that "[a] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions . . . shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. 198 U.S. at 75-76.

substantive due process "to strike down state laws, regulatory of business and industrial conditions, because they . . . [were thought to] be unwise, improvident, or out of harmony with a particular school of thought." Williamson v. Lee Optical, 348 U.S. 483, 488 (1955).

Lochner "wisdom substitution" subsided with Nebbia v. New York, which held that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose." 291 U.S. 502, 537 (1934).¹⁶

In Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952), the Court refused to invalidate a rationally-based

¹⁶"[S]tates have power to legislate against . . . injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid Federal law." Lincoln Union v. Northwestern Co., 335 U.S. 527, 537 (1949). See West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

state statute, declaring they "do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."

In Moore v. East Cleveland, 431 U.S. 494 (1977), this Court cautioned against judicial redrafting of state law where the outcome would rest on "the predilections of those who happen at the time to be Members of this Court" rather than on a firm constitutional basis. 431 U.S. at 502. These cases reflect self-imposed judicial restraint, an accurate vision of the judiciary, and compel states to be accountable for formulating credible economic policy.

Restricted review does not occur when assessing "statutes directed at particular religious, or national, or racial minorities . . . which tend . . . seriously to curtail the operation of those political processes ordinarily to be relied upon to

protect minorities. . . ." United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938). These cases employ a careful review of state law on fundamental entitlements or privacy interests within the penumbral privacy domain of the First Amendment, none of which bear the slightest resemblance to the interests asserted by petitioner in this case.¹⁷

Petitioner's quest for "substantive review" of punitive damages based on due process seems particularly far afield when consideration is given to those critical, basic areas where the Court has refused to apply substantive due process. In Bowers

¹⁷See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (involving abortion); Boddie v. Connecticut, 401 U.S. 371 (1971), and Loving v. Virginia, 388 U.S. 1 (1967) (involving freedom of choice in marital decisions); Griswold v. Connecticut, 381 U.S. 479 (1965), involving marital privacy; Carey v. Population Services Int'l, 431 U.S. 678 (1977) (purchase of contraceptives); Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923) (involving child rearing).

v. Hardwick, 478 U.S. 186 (1986), the Court declined to extend the notion of fundamental rights to homosexual relations and refused to

take a more expansive view of [their] authority to discover new fundamental rights imbedded in the Due Process Clause. . . . [T]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. [When that occurs] . . . the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

478 U.S. 186 at 194-95.

A complaint about a state system of punitive damages that punishes and deters future misconduct does not involve a fundamental right, involves no language or concept having "cognizable roots" in the Constitution, and would require a redefinition of constitutional entitlements, a process hardly merited by the claims in this case.

After Bowers, this Court rejected

substantive due process claims in DeShaney v. Winnebago County DSS, 109 S. Ct. 998 (1989), involving the reaction of the state to a child abuse complaint.

The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act. . . . But they should not have it thrust upon them by this court's expansion of the Due Process Clause of the Fourteenth Amendment.

Id. at 1007. The people of Alabama may well have preferred a different "system of liability" for punitive damages prior to 1987, but like the people of Wisconsin, "they should not have it thrust upon them by this Court's expansion of Due Process." Id.

Bowers and DeShaney demonstrate the tremendous constraints in the area of due process. The interests asserted in these cases are critical, private, basic, and broad reaching, yet the power of the states to formulate and implement policy outside of a direct constitutional claim

must prevail.

In the present case, petitioner's quest to be free from pre-1987 Alabama punitive damages involves neither a fundamental right, nor a recognized personal autonomy interest. The state of Alabama need show only that its system for awarding punitive damages is rational and furthers a valid state objective.

The ultimate crisis caused by an overexpansive view of substantive due process is found in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), where Chief Justice Taney used due process for redefining evolving economic interests that pertained to slavery. The catastrophic consequences of Dred Scott illuminate two canons of constitutional interpretation. Rehnquist, The Supreme Court at 144. The first requires restraint in the use of the Constitution to resolve a matter addressed appropriately by other standards. Id.

Alabama has addressed the problem of punitive damages through recent legislation, as have numerous states. See Appendix A. The second holds that a mere sense of unfairness is not a basis to declare a law unconstitutional. "[A] sense that a law is unfair, however deeply felt, ought not to be itself a ground for declaring an act of Congress void." Id. at 145.

Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.

Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 700 (1976).

In light of the modern constitutional history of substantive due process, it is difficult to envision why this Court would seek to second-guess evolved rational economic policy. "If determinations limiting the availability of punitive damages are

to be made, this determination must be made by the state legislature." Puppe, 733 F. Supp. at 1362.

B. Substantive Due Process Is Not Offended by Juries Making Property-Affecting Decisions in Punitive Damage Cases.

If a law is "so vague and standardless . . . [and] leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards what is prohibited and what is not," then the law is void for vagueness. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966). Petitioners contend that the Alabama system was standardless because it contained no fixed levels, caps, or other precise limitations. In Smith v. Wade, 461 U.S. 30, 56 (1983), this Court found that "a jury may be permitted to assess punitive damages in an action under 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or

when it involves reckless or callous indifference to federally protected rights of others." This Court required no more in terms of precision, nor did it impose a ceiling on punitive damages.

We trust juries to guard against the misuse of power and to demonstrate conscience, allowing them to assess community standards and make highly complicated decisions. Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). Since this Court is willing to allow juries to decide matters of life and death, they should be trusted "to make a fair assessment of punitive damages in a civil tort case." Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797, 824 (1987).

The state of Alabama uses juries as a means of effecting property interests. To

suggest that a jury is an irrational choice or that jurors are inherently arbitrary or incapable of making intelligent choices offends the American system of jurisprudence.¹⁸ Jurors take seriously the responsibility of assessing culpability and award amounts and, on a national level, tend to deny punitive damages in the vast majority of cases, making modest awards in those few cases where punitive damages are deserved. Daniels & Martin 1990 at 35-39, 56-60. From the earliest British punitive damage cases forward, there has been a "respect for the jury's discretion and a hesitancy to interfere with its judgment." Borowsky & Nicolai-

¹⁸The issue of the competence of jurors to make proper choices hardly seems proper for argument. See Newport v. Fact Concerts, 453 U.S. 247, 270 (1981); Brotherhood of Elec. Workers v. Foust, 442 U.S. 42, 50-51 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974). See also Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916, 925 (Ala. 1981), and compare Commodore Corp. v. Bailey, 393 So. 2d 467 (Miss. 1981).

sen, Punitive Damages in California: The Integrity of Jury Verdicts, 17 U.S.F. L. Rev. 147, 152 (1983) (footnotes omitted). The underlying reason for empowering the jury in this area is obvious:

[T]he jury is in the best possible position to function as the communities' conscience. The jury's reaction of shock and outrage presumably mirror those of the community as a whole. Thus when the jury decides to make a punitive award, it is expressing society's disapproval; and when it sets the amount of the award, it measures societies' outrage and determines the degree of punishment that society believes will deter the defendant and others like him.

Borowsky & Nicolaisen at 152-53.

C. Properly Instructed Jurors in Alabama Use Comprehensible Standards to Determine Punitive Damage Levels.

— This Court's invitation to consider punitive damage levels in due process terms¹⁹ has given rise to a series of

¹⁹See Browning-Ferris, 109 S. Ct. at 2923 (1989) (Brennan, J., concurring, joined by Marshall, J.); id. at 2924 (O'Connor, J., concurring, joined by Stevens, J.); Crenshaw, 486 U.S. at 87-88 (1988) (O'Connor, J., concurring, joined by Scalia, J.).

cases which assess the means by which states instruct juries on damages. Typical of the post-Browning-Ferris cases is Man v. Raymark Indus., 728 F. Supp. 1461 (D. Haw. 1989), where the court assessed the Hawaii system of jury instructions for punitive damages. The standards in Hawaii are similar to those in Alabama. As to standard of proof, Alabama required proof by a preponderance of the evidence prior to 1987, while Hawaii requires proof by clear and convincing evidence. Although this difference is meaningful, it is hardly the basis for finding one standard constitutional and the other unconstitutional.

Based on these standards, the court found the Hawaii system comported with and exceeded requirements established by this Court in Smith v. Wade, 461 U.S. 30 (1983), and in Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). "[T]he

standard established by Hawaii law is sufficient to apprise potential defendants and juries of both the nature of the conduct which may expose one to punitive damage liability as well as what level of award is appropriate under the circumstances." 728 F. Supp. at 1465. In virtually every case examining punitive damages since Browning-Ferris, based on the standards in the Hawaii case that reflect the law of the state of Alabama, the result has been the same. See Appendix B listing post-Browning-Ferris cases where a due process claim was raised.

At the time the present case went to trial, Alabama had evolved standards for punitive damages that focused on punishment and deterrence. Badgett v. McDonald, 304 So. 2d 228 (Ala. Civ. App. 1974); Ex parte Smith, 412 So. 2d 1222 (1982). The amount is left to the sound discretion of the jurors who act "with regard to the

enormity of the wrong and the necessity of preventing a similar wrong." J. Truett Payne Co. v. Jackson, 281 Ala. 426, 429, 203 So. 2d 443, 446 (1967); Aetna Life Ins. Co. v. Lavoie, 470 So. 2d 1060, 1076 (Ala. 1984). The amount "must not exceed an amount that will accomplish society's goals of punishment and deterrence." Green Oil v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989). The level of wrongdoing required prior to finding liability for punitive damages was fraud that was gross, oppressive, or aggravated. Mobile Dodge, Inc. v. Waters, 404 So. 2d 26 (Ala. 1981). These standards reflect an intense, internal debate within the Alabama court system demonstrating careful and well evolved measures.²⁰

²⁰See Alabama Pattern Jury Instructions § 11.03 (1974):

The purpose of awarding punitive damages or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the (Cont'd)

The trial judge in the present case gave instructions "to punish the defendant . . . make an example. . . . take into consideration the character and degree of wrong [and prevent] similar wrongs." R.T. at 897-98. The trial judge enunciated the purpose of punitive damages and explained the level of culpability needed, as expressed in the caselaw, to warrant a punitive damage award. The standards are clear, and the jury was properly instructed. To contend that this is a "standardless" process flawed by vagueness or that the judge failed to communicate state law is to deny fact.

D. There Is Rational Review of Punitive Damage Awards.

Alabama review of punitive damages

defendant and for the purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. . . . You must take into consideration the character and degree of wrong as shown by evidence in the case, and the necessity of preventing similar wrongs.

includes conventional remittitur, a petition process for a new trial, an appeal of the denial of either, and de novo review of the jury's verdict on appeal.²¹ Bias, passion, prejudice, corruption, improprieties, or excessiveness are grounds for a new trial court unless the plaintiff accepts a remittitur.²²

Post-verdict review by the trial judge in the present case was guided by Green Oil v. Hornsby, 539 So. 2d 218 (Ala. 1989), and Hammond v. City of Gasden, 493 So. 2d 1374 (Ala. 1986), requiring judges

²¹Ala. Code § 12-22-71 (1975).

²²"When the record establishes that the award is excessive or inadequate as a matter of law, or where it is established as reflected in the record the verdict is based upon bias . . . may a trial court order a new trial or remittitur." Hammond v. City of Gasden, 493 So. 2d 1374, 1379 (Ala. 1986). Post-trial hearings include consideration of "the culpability of the defendant's conduct, Ridout's-Brown Service, Inc. v. Holloway, 397 So. 2d 125 (Ala. 1981); the desirability of discouraging others from similar conduct, Ford Motor Credit Co. v. Washington, 420 So. 2d 14 (Ala. 1982); the impact upon the parties, Alabama Power Co. v. Hussey, 291 Ala. 586, 285 So. 2d 92 (1973)."

to explain in written orders punitive damage awards, taking into account the level of the defendant's culpability, various wealth-based factors, and the existence of other sanctions imposed on the defendant. These standards have led to reversal or modification of a number of jury or lower court decisions.²³

The system for awarding and reviewing punitive damages in Alabama was designed to catch and change jury decisions that are arbitrary or irrational. Jury instructions reflect a rational, pro-consumer state policy, and trial and appellate

²³See, e.g., Burroughs Co. v. Hall Affiliates, 423 So. 2d 1348 (Ala. 1982), reversal on failure to find appropriate level of culpability; Treadwell Ford v. Leek, 272 Ala. 544, 547, 133 So. 2d 24, 26 (1961), reversed for failure to find intent; Mobile Dodge v. Waters, 404 So. 2d 26 (Ala. 1981), failure to find malice; United Services Auto. Assn. v. Wade, 544 So. 2d 906 (Ala. 1989), amount reduced by \$1 million after review. See also Waste Disposal v. Stewart, 432 So. 2d 1255 (Ala. 1983), Courtesy Ford Sales, Inc. v. Clark, 425 So. 2d 1075 (Ala. 1983), and Ex parte Smith, 412 So. 2d 1222 (Ala. 1982), regarding the need for precise findings of deceit.

court review provide fundamental safeguards that comport with fundamental due process.

**E. Tort Reform Legislation in 1987
Refined Punitive Damages Law and
Reflects the Social and Economic
Policy of the State.**

In 1987 Alabama adopted new guidelines for punitive damage cases. Ala. Code § 6-11-20 through 6-11-30 (Supp. 1988). The law affects burden of proof, presumptions of correctness of jury verdicts, award levels, vicarious liability, and appellate process. Id. Alabama has formed its own safeguards without external mandate for all punitive damage cases.

In Crenshaw, supra, this Court expressed a clear desire for states to evaluate their tort systems.

Our review . . . now would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the . . . State Legislature might choose to enact legislation addressing punitive damage awards . . . [or] state courts may choose to resolve the issue by relying on the State Constitution or on some other

adequate and independent non-federal ground.

486 U.S. at 79-80. Since the law at the time the present case was decided was facially constitutional, and the law in place today is explicitly responsive to this Court's request in Crenshaw, an intrusive decision elaborating on punitive damages would smack of judicial opportunism.

F. The Alabama System for Determining Punitive Damages Comports with the Requirements of Procedural Due Process.

A true failure of appropriate process is a most serious constitutional matter. Were the petitioner denied notice of a legal standard, sanctions or the process whereby its property interests would be affected, or were there a denial of an opportunity to be heard at the pretrial, trial, post-trial, or appellate review level, this Court would be obligated to move aggressively. This case does not involve a denial of an opportunity to be

heard or notice, but rather a disagreement over the wisdom of substantive choices made by Alabama. Such is hardly an appropriate matter for a due process review.

The action of a court or an official of the judicial branch constitutes state action for the purposes of the Fourteenth Amendment when their acts affect a constitutionally protected interest. Shelley v. Kraemer, 334 U.S. 1, 14 (1948). A person compelled to rely upon the authority of a court to settle a civil dispute must be given a meaningful opportunity to be heard. Boddie v. Connecticut, 401 U.S. 371, 377 (1971). Deciding what processes are due requires a balancing of interests articulated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Mathews established a three-part test for balancing various interests when the state action affects life, liberty, or property requiring an assessment of the private interests and

government interests affected, as well as the risk of error in the process.

The nature of the specific interest effected is of consequence as it can dictate the process required. Neither the loss of life nor liberty is at issue in a punitive damages case.²⁴ There is then only a "simple property" interest involved in this case. This Court has previously held that a property interest may not enjoy the same procedural protections as life or liberty interests. See, e.g., Lassiter v. Dept. of Social Services, 452 U.S. 18, 41 n.8 (1981) (Blackmun, J., dissenting); and Phillips v. Commissioner,

²⁴It has been argued that punitive damages deprive a party of liberty and property because such an award can harm a person's reputation. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 278-84 (1983). This argument is flatly at odds with Paul v. Davis, 424 U.S. 693 (1976), and Bishop v. Wood, 426 U.S. 341, 348 (1976), where this Court held that there is no liberty interest in reputation. But see Brandt v. Board of Co-Op Education, 820 F.2d 41, 43 (2d Cir. 1987).

283 U.S. 539, 596-97 (1931).

In light of this background, it is appropriate to ask whether the process provided petitioner conformed with the baseline constitutional requirements of due process for protection of a property interest. This analysis, as with any procedural due process question, should be centered on notice and an opportunity to be heard. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985); Brock v. Roadway Express, 481 U.S. 252 (1987). Petitioner is entitled to notice of the standards of culpability and evidence proffered by his adversary, to an opportunity to respond and present his own evidence, and to a timely process. These procedural entitlements were provided.

Petitioner claims, however, that it was entitled to "better" jury instructions, including limits on liability, to more oral clarity from the judge who gave

the jury instructions, and to a "better" set of laws regarding punitive damages. These matters may be of great consequence, but they are not part of a procedural due process analysis. They are substantive law issues vested to the best judgment of the state of Alabama. In a due process punitive damage case decided this spring, a North Dakota court assessed accurately the complainant's rights:

Procedural due process guarantees only that there is fair decision-making process before the government takes some action directly impairing a person's life, liberty, or property. This procedural aspect of the due process clause does not protect against the use of arbitrary rules of law which are the basis of those proceedings.

Puppe, 733 F. Supp. at 1360 (footnotes omitted). See also Section III.

Petitioner's contentions have merit only if this Court accepts the proposition that there are no jury instructions, no guidance at all, in contravention of this Court's ruling in Giaccio v. Pennsylvania,

382 U.S. 399 (1966). As has been demonstrated, however, the jury in this case was given instruction on culpability and damage amounts that required the jury to consider punishment, deterrence, and the nature of the wrongdoing. (RT 896-898.) Based on the rulings of this Court and courts reviewing similar systems, this is not a "standardless" process.²⁵

As previously noted, the methodology for determining process entitlements requires an assessment of petitioner's private interests, in this case money. Specifically, petitioner would like greater certainty and predictability regarding the potential of a large punitive damage award. Such information would allow petitioner to modify its rate base and ensure

²⁵Smith v. Wade, 461 U.S. 30 (1983); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Racich v. Celotex Corp., 887 F.2d 393 (2d Cir. 1989); Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297 (D.N.J. 1990); Man v. Raymark Indus., 728 F. Supp. 1461 (D. Haw. 1989).

against the "sting" of a punitive damage award. As already demonstrated, a component of uncertainty forwards the rational state interest in the punishment function of punitive damages. (See Section II, Part C.)

Petitioner's interest in certainty regarding disposition of his property runs in tandem with petitioner's allegation that the Alabama jury system presents a dangerously high risk of erroneous decisionmaking, the second leg of the Mathews test. Petitioner argues that the jury was given unfettered discretion in this case to make an award of punitive damages in any amount it wished. The jury in this case heard all of the evidence at trial, including the petitioner's defenses. They were instructed that they did not have to award punitive damages, but if they chose to, the amount should reflect what is necessary to punish, deter, and make an

example of the petitioner and take into consideration the character and degree of the wrong committed by the petitioner. (RT 898 et seq.)

The foregoing process is constitutionally sufficient,²⁶ particularly in light of the fact that the trial judge conducted a review of the award returned by the jury in light of Hammond v. City of Gasden, 493 So. 2d 1374 (Ala. 1986). To say that there is a high risk of error requires the belief that jurors make bad decisions when properly instructed, hardly a convincing position.

The final leg of a Mathews analysis requires an assessment of the governmental

²⁶A very similar complaint was raised in Germanio, supra, regarding procedural due process and punitive damages. That court found the "[d]efendants [are] afforded every opportunity consistent with the requirements of due process in civil cases, including the right to present mitigating evidence on the punitive damage issue, should the case reach that juncture." Germanio, 732 F. Supp. at 1304.

interest in the challenged process. In this case a procedural due process attack has been levied against the use of a jury and the content of Alabama law. The state has a significant interest in maintaining a punitive damage system that allows juries to express the will of the state to punish intentional wrongdoers and deter future destructive behavior.²⁷

These are powerful interests in comparison with the private interest of the defendant. In light of these interests, it is hard to conceive of a reasoned analysis that would compel this Court to rewrite the laws of Alabama based on a failure of procedural due process. The phrases used by the trial court judge could have been articulated more clearly.

²⁷Juries are often called upon to make important decisions on matters affecting the well being of the community. See Witherspoon v. Illinois, 391 U.S. 510, 519 (1968), and Miller v. California, 413 U.S. 15 (1973).

Poor grammar, however, does not make a judicial instruction unconstitutional. Improving, refining, and analyzing judicial instructions is a proper task for a judicial conference. It is wholly inappropriate, however, to use the Constitution to fine-tune judicial instructions.

G. Punitive Damages Are Not Criminal Sanctions Entitled to Special Procedural Protections.

The finding in Browning-Ferris Indus. v. Kelco Disposal, Inc., supra, put to rest the question of whether punitive damages were "criminal" in nature, obligating courts to consider a more broad range of procedural protections. Petitioners and amici refuse to accept this fact and contend that they are criminal, necessitating a brief response.

Punitive damages serve multiple purposes including punishment. The mere fact that one of the purposes underlying punitive damages is similar to one of the pur-

poses underlying criminal law does not change the stark legal fact that punitive damages are recognized to "have long been a part of traditional state tort law." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984).

Implicitly, Silkwood allows for the recognition of different protective regimes within our legal system. Civil fines address governmental needs, ensuring the implementation of legislatively-mandated behavioral norms, e.g., 42 U.S.C. § 2011 et seq. (1976 ed. and Supp. V), and are subject to scrutiny by the federal courts, while punitive damages are subject to scrutiny pursuant to state tort law principles. 464 U.S. at 257.

To characterize punitive damages as civil fines and then move civil fines into the domain of criminal fines requires a large jurisprudential leap, ignoring whole blocks of established precedent. Kelly v.

Robinson, 479 U.S. 36, 49 n.10 (1986).²⁸

Punitive damages are not criminal sanctions. They derived from the system of private wrongs, not public wrongs. There is not a single instance in all of American jurisprudence in which a court has accepted the proposition that a state common law tort remedy (not a legislative sanction) could somehow be recharacterized as a criminal sanction.²⁹

²⁸San Francisco Civil Service Ass'n v. Superior Court of Marin County, 16 Cal. 3d 46, 49, 127 Cal. Rptr. 131, 134, 544 P.2d 1331, 1334 (1976), deals with the relationship between fines and punitive damages, holding that fines "collected civilly are not punitive damages. . . ," following § 908 of the Restatement (Second) of Torts, comment a (1977).

²⁹Presented with the precise contention that the "criminal" nature of punitive damages compels a different process, the court in Germanio, held:

We do not see any reason why this Court should extend other protections normally enjoyed only by criminal defendants to defendants in a tort case faced with the claim for punitive damages. The framers of the Bill of Rights and the Fourteenth Amendment could easily have done so, and did not.

732 F. Supp. at 1304 (footnote omitted).

IV

VICARIOUS LIABILITY ASSURES ACCOUNTABILITY AND COMPORTS WITH DUE PROCESS.

The petitioner and various amici have argued that it is unfair to compel Pacific Mutual to pay punitive damages for the intentional misconduct of an agent of Pacific Mutual based on vicarious liability. The agent was authorized to make representations on behalf of Pacific Mutual. His misdeeds were outside the range of practices approved by Pacific Mutual. Nonetheless, to employees like Cleopatra Haslip he gave reasonable assurance that he was operating on behalf of Pacific Mutual.

Though it has been argued that Pacific Mutual was on notice of the agent's activity, that is not essential to finding Pacific Mutual liable. "The majority of courts . . . have held that the vicarious liability of the master for acts within the scope of the employment extend to punitive . . . damages, . . . [particu-

larly] if damages will encourage employers to exercise closer control over their servants for the prevention of outrageous torts. . . ." Prosser & Keaton on Torts 13 (5th ed. 1984).³⁰

American Society of Mechanical Engineers v. Hydrolevel, 456 U.S. 556 (1982), held that nonprofit organizations can be liable for the misdeeds of its agents when the organization neither ratifies nor authorizes the intentional misconduct, where the agent's behavior is secret, and the misconduct is solely for his benefit. Hydrolevel reaffirms the principle of corporate accountability. More than a half-century ago, this Court held that "few doctrines of law are more firmly

³⁰Punitive damages can be assessed against a corporation for the misconduct of its agents without violating due process. Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927); St. Louis I. M. & S. Ry. v. Taylor, 210 U.S. 281 (1908); Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907).

established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." Gleason v. Seaboard Airline Arco, 278 U.S. 349, 357 (1929). The line between Gleason and Hydrolevel is unbroken. The policy underlying this case series is simple: the public, consumers, must be able to rely upon the representations of agents who are cloaked with the authority to act on behalf of corporations. When those representations prove to be fraudulent they are, for better or worse, the representations of the corporation.³¹

Were this Court to find that it is inappropriate to impose punitive damages

³¹See Ricketts v. Pennsylvania Railroad Co., 153 F.2d 757, 759 (2d Cir. 1946), where Judge Learned Hand wrote "an agent does not cease to be acting within the scope of his authority when he is engaged in a fraud upon a third person. . . . [T]he third person has no means of knowing that the agent is acting beyond his authority. . . ."

on Pacific Mutual for the misdeeds of its agent, it would permit insurance companies to look quietly the other way while their agents engaged in fraudulent activity. The deterrent or incentive value of punitive damages would be lost. The maximum exposure of a company is likely to be nothing more than the obligations created by nonfraudulent transactions.

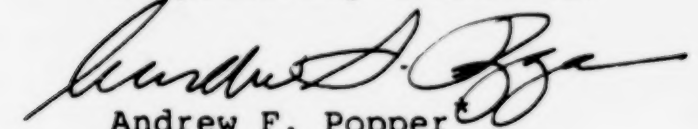
If the punitive damage award is upheld Pacific Mutual will be forced to pay out a large sum of money it had hoped greatly to use for other purposes. It will communicate with its agents nationwide. It will upgrade its review of field agents using the Pacific Mutual name. In short, Pacific Mutual will take every possible step to prevent this type of misconduct in the future. Other insurance companies will learn quickly of Pacific Mutual's behavior; like trade associations after Hydrolevel, they will take steps to

prevent misconduct by agents acting with apparent authority.

CONCLUSION

It has been demonstrated that there is no punitive damage crisis sufficient to warrant judicial intervention, that punitive damages provide multiple benefits and further rational state objectives, and that the Alabama system for determining punitive damages comports with the requirements of procedural and substantive due process. Accordingly, the decision of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,



Andrew F. Popper*
Professor of Law and
Deputy Dean
Counsel of Record
The American University
Washington College of Law
Washington, DC 20016
(202) 885-2604
Attorney for Amicus
Curiae

*This is to extend deepest appreciation to Robert Brener, Anne Guy, Nancy Juda, and Richard Sauer for their fine work in preparing this brief.

APPENDIX A

Legislation proposed in Congress to modify punitive damages includes:

1. S. 1400, 101st Cong., 1st Sess. (1989)
2. H.R. 2700, 101st Cong., 1st Sess. (1989)
3. H.R. 1115, 100th Cong., 1st Sess. (1987)
4. S. 2760, 99th Cong., 2d Sess. (1986)
5. S. 1999, 99th Cong., 1st Sess. (1985)
6. S. 100, 99th Cong., 1st Sess. (1985)
7. S. 44, 98th Cong., 1st Sess. (1983)
8. S. 2631, 97th Cong., 2d Sess. (1982).

The following are examples of state "tort reform":

1. Ala. Code § 6-11-20 et seq. (Supp. 1988)
2. Alaska Stat. § 09.17.020 (Supp. 1988)
3. Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990)
4. Colo. Rev. Stat. §§ 13-21-102, 13-25-127 (Supp. 1986)
5. Conn. Gen. Stat. § 52-240(b) (Supp. 1989)

6. Fla. Stat. Ann. §§ 768.72 through 768.74 (West Supp. 1989)
7. Ga. Code Ann. § 51-12-5.1 (Supp. 1989)
8. Idaho Code § 6-1604 (Supp. 1989)
9. Ill. Ann. Stat. ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989)
10. Ind. Code Ann. § 34-4-34-2 (Burns 1986).
11. Iowa Code Ann. § 668A.1 (West 1987)
12. Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989)
13. Ky. Rev. Stat. §§ 411.184, 411.186 (1988)
14. Minn. Stat. Ann. §§ 549.191, 549.20 (West 1988)
15. Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990)
16. Mont. Code Ann. § 27-1-221 (1987)
17. Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989)
18. N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988)
19. N.J. Stat. Ann. § 2A:58C-5 (West 1987)
20. N.D. Cent. (Page Supp. 1988)
21. Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988)

22. Okla. Stat. Ann. tit. 23, § 9 (West 1987)
23. Or. Rev. Stat. §§ 30.925; 18.540, 41.315 (1987)
24. S.C. Code Ann. § 15-33-135 (Supp. 1988)
25. S.D. Rev. Code § 21-1-4.1 (1987)
26. Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 et seq. (Vernon Supp. 1990)
27. Utah Code Ann. § 78-18-1 (Supp. 1989)
28. Va. Code Ann. 8.01-38.1 (Supp. 1989)

APPENDIX B

The following cases are typical of due process challenges to punitive damage systems after this Court's decision in Browning-Ferris:

1. Racich v. Celotex Corp., 887 F.2d 393 (2d Cir. 1989) (refused to tamper with punitive damage system based on traditional due process requirements).
2. Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir. 1990) (more precise and restrictive standards for imposing punitive damages are foreclosed by Racich).
3. Eichenseer v. Reserve Life Ins., 881 F.2d 1355 (5th Cir. 1989) (Mississippi law of punitive damages does not violate Fourteenth Amendment due process standards).
4. Campbell v. A.C. & S., 704 F. Supp. 1020 (D. Mont. 1989) (punitive damage law not unconstitutionally vague).
5. Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297 (D.N.J. 1990), and Leonen v. Johns-Manville Corp., 717 F. Supp. 272 (D.N.J. 1988) (punitive damage awards in New Jersey do not deny due process).
6. Horowitz v. Schneider Nat., 708 F. Supp. 1573 (D. Wyo. 1989) (Wyoming punitive damage law comports with due process).

7. Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989) (Minnesota punitive damage law is constitutional).
8. Hospital Authority v. Jones, 259 Ga. 759, 386 S.E.2d 120 (1989) (Georgia punitive damages system meets parameters of due process).
9. Lazarus Dept. Store v. Sutherlin, 544 N.E.2d 513 (Ind. App. 1 Dist. 1989) (Indiana punitive damage awards do not violate due process).
10. Stoner v. Nash Finch, 446 N.W. 2d 747 (N.D. 1989) (North Dakota punitive damages system not constitutionally defective).

JUL 16 1989

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Alabama

BRIEF AMICUS CURIAE OF THE ATTORNEY
GENERALS OF ALABAMA, CALIFORNIA AND
TEXAS IN SUPPORT OF RESPONDENTS

JOHN K. VAN DEKAMP
Attorney General of
California
MICHAEL J. STRUMWASSER
Special Assistant
Attorney General
Department of Justice
3580 Wilshire Boulevard
Suite 800
Los Angeles, California
90010
(213) 736-2102

JIM MATTOX
Attorney General of Texas
Supreme Court Building
Seventh Floor
P.O. Box 12548
Austin, TX 78711
(512) 463-2191

DON SIEGELMAN*
Attorney General of
Alabama
GEORGE E. JONES III
Assistant Attorney General
Office of the Attorney
General
11 South Union Street
Montgomery, Alabama
36130
(205) 242-7300

*Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
STATEMENT	1
ARGUMENT	2
I. PUNITIVE DAMAGES ADVANCE IMPORTANT POLICY OBJECTIVES IN A REASONABLE WAY, AND THUS SATISFY DUE PROCESS.....	2
1. Substantive Due Process Review	2
2. Procedural Due Process Review	4
II. PRINCIPLES OF FEDERALISM AND JUDICIAL RESTRAINT DICTATE THAT THIS COURT LEAVE THE ISSUE OF "REFORMING" PUNITIVE DAMAGES TO STATE LEGISLATURES AND COURTS	5
III. ACCEPTANCE OF PETITIONER'S PROPOSED EXPANSION OF DUE PROCESS WOULD EFFECTIVELY TURN THIS COURT, AS WELL AS LOWER FEDERAL AND STATE COURTS, INTO ONGOING REGULATORS OF THE SUFFICIENCY OF STATE PROCEDURES FOR ASSESSING PUNITIVE DAMAGES.....	12
IV. IF ACCEPTED BY THIS COURT, THE PETITIONER'S DUE PROCESS ARGUMENTS WOULD JEOPARDIZE THE CONSTITUTIONALITY OF CRIMINAL SENTENCING SCHEMES	13
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES:

<i>American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.</i> , 456 U.S. 556 (1982)	3
<i>Bankers Life & Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988)	7
<i>Barclay v. Florida</i> , 463 U.S. 939 (1983)	14
<i>Britton v. Rogers</i> , 631 F.2d 572 (8th Cir. 1980)	15
<i>Burnham v. Superior Court of California</i> , 110 S.Ct. ___, 58 U.S.L.W. 4629 (1990)	4
<i>Chandler v. Florida</i> , 449 U.S. 560 (1981)	6, 7
<i>Clemons v. Mississippi</i> , 194 U.S. ___ (1990)	12
<i>FERC v. Mississippi</i> , 456 U.S. 742 (1982)	6
<i>Ferguson v. Skrupa</i> , 372 U.S. 726 (1963)	8
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	12
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	8
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980)	13
<i>Green Oil Co. v. Hornsby</i> , 539 So.2d 218 (Ala. 1989)	11
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	12
<i>Hammond v. City of Gadsden</i> , 493 So.2d 1374 (Ala. 1986)	11
<i>Lincoln Union v. Northwestern Co.</i> , 335 U.S. 525 (1949)	6
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	13, 14

TABLE OF AUTHORITIES – Continued

Page

<i>Maynard v. Cartwright</i> , 108 S.Ct. 1853 (1988)	13
<i>New Motor Vehicle Board of California v. Orrin W. Fox Co.</i> , 439 U.S. 96 (1978)	6
<i>New State Ice Co. v. Liebmann</i> , 285 U.S. 262 (1932) ...	6, 7
<i>Pulley v. Harris</i> , 465 U.S. 37 (1984)	13
<i>Rogers v. State</i> , 582 S.W.2d 7 (Ark. 1979)	15
<i>Smith v. Follette</i> , 445 F.2d 955 (2d Cir. 1971)	15
<i>Stevens v. Armatrout</i> , 787 F.2d 1282 (8th Cir. 1986)	15
<i>United States v. Baker</i> , 429 F.2d 1344 (7th Cir. 1970)	15
<i>United States v. Davis</i> , 801 F.2d 754 (5th Cir. 1986), cert. denied, 108 S.Ct. 2908 (1988)	15
<i>United States v. Florence</i> , 741 F.2d 1066 (8th Cir. 1984)	15
<i>United States v. Wivell</i> , 893 F.2d 156 (8th Cir. 1990)	14
<i>Walton v. Arizona</i> , 110 S.Ct. 410 (1990)	12
<i>Williamson v. Lee Optical Co.</i> , 348 U.S. 483 (1955) ...	3, 8
<i>Zant v. Stephens</i> , 463 U.S. 862 (1983)	13, 14
STATUTES:	
Ala. Code § 6-11-20 (Supp. 1988)	8
Ala. Code § 6-11-21 (Supp. 1988)	9
Alaska Stat. § 09.17.020 (Supp. 1988)	8
Cal. Ann. Civ. Code § 3294 (West Supp. 1990)	8

TABLE OF AUTHORITIES – Continued

Page

Cal. Ann. Civ. Code § 3295 (West Supp. 1990).....	8
Colo. Rev. Stat. § 12-25-127 (Supp. 1986).....	8
Colo. Rev. Stat. § 13-21-102 (Supp. 1986).....	8, 9
Conn. Gen. Stat. § 54-240 (Supp. 1989).....	8
Fla. Stat. Ann. §§ 768.72-768.74 (West Supp. 1989)...	8, 9
Ga. Code Ann. § 51-12.5.1 (Supp. 1989).....	8, 9
Idaho Code § 6-1604 (Supp. 1989).....	8
Ill. Ann. Stat. ch. 110 § 2-604.1 (Smith-Hurd Supp. 1989).....	8
Ill. Ann. Stat. ch. 110 § 6-1207 (Smith-Hurd Supp. 1989).....	8
Ind. Code Ann. § 34-4-34-2 (Burns 1986).....	8
Iowa Code Ann. § 668A.1 (West 1987).....	8
Kan. Civ. Proc. Code Ann. §§ 60-3701-60-3703 (Vernon Supp. 1989).....	8, 9
Ky. Rev. Stat. § 411.184 (1988).....	8
Ky. Rev. Stat. § 411.186 (1988).....	8
Minn. Stat. Ann. § 549.191 (West 1988).....	8
Minn. Stat. Ann. § 549.20 (West 1988).....	8
Mo. Ann. Stat. § 510.263 (Vernon Supp. 1990).....	9
Mo. Ann. Stat. § 537.675 (Vernon Supp. 1990).....	9
Mont. Code Ann. § 27-1-221 (1987).....	9

TABLE OF AUTHORITIES – Continued

Page

Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989).....	9
N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988).....	9
N.J. Stat. Ann. § 2A:58C-5 (West 1987).....	9
N.D. Cent. Code § 32-03.2-11 (Supp. 1987).....	9
Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988).....	9
Okla. Stat. Ann. tit. 23, § 9 (West 1987).....	9
Or. Rev. Stat. § 30.925 (1987).....	9
Or. Rev. Stat. § 18.540 (1987).....	9
Or. Rev. Stat. § 41.315 (1987).....	9
S.C. Code Ann. § 15-33-135 (Supp. 1988).....	9
S.D. Rev. Code § 21-1-4.1 (Vernon Supp. 1990).....	9
Tex. Civ. Prac. & Rem. Code Ann. § 41.001 (Vernon Supp. 1990).....	9
Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1990).....	9
Utah Code Ann. § 78-18-1 (Supp. 1989).....	9
Va. Code Ann. 8.01-38.1 (Supp. 1989).....	9

INTEREST OF AMICI

The Attorney Generals of Alabama, California and Texas, and the offices that serve them, are responsible for the public enforcement of laws protecting public health, safety and welfare. The Attorney Generals are also directly responsible for enforcement of the criminal law generally, and, as part of that responsibility, have a strong interest in the processes of criminal sentencing. More broadly, the Attorney Generals maintain a strong interest in preserving the appropriate balance of regulatory authority between the States and the federal government in our system of federalism.

As this brief will demonstrate, this case strongly implicates each of these interests.

STATEMENT

This case involves a federal constitutional challenge to Alabama's traditional common law rules governing punitive damages for intentional fraud. In the judgment of *amici*, elemental principles of federalism and judicial restraint dictate that the States – and not this Court – should decide how and when punitive damages may be assessed in civil cases between private litigants. Federalizing the law of punitive damages risks undermining important state policy objectives and could throw the constitutionality of many state criminal sentencing statutes into doubt.

The present case does not raise any of the issues that have led some to question the wisdom and fairness of

punitive damages. This is not a case in which a defendant was assessed multiple punitive awards for a single wrongful act. Nor is this a case in which the punitive award was staggering or wholly out of proportion to the compensatory award. This case involves typical, garden-variety fraud of the kind that has given rise to punitive damages in this country for centuries. It is precisely the kind of case in which punitive damages function well, and uncontroversially, to vindicate state policy objectives through private enforcement and deterrence of serious harmful conduct.

ARGUMENT

I. PUNITIVE DAMAGES ADVANCE IMPORTANT POLICY OBJECTIVES IN A REASONABLE WAY, AND THUS SATISFY DUE PROCESS.

Amici recognize that the Due Process Clause, in both its substantive and procedural aspects, applies to state standards and procedures for assessing punitive damages, and to punitive awards made pursuant to these standards and procedures. However, in the judgment of *amici*, this Court's due process jurisprudence dictates that the standard of review for both substantive due process issues and procedural due process issues should be extremely deferential.

1. Substantive Due Process Review. Because punitive damages are at bottom a form of state economic and public welfare regulation, substantive due process scrutiny of state vicarious liability rules and of the potential

excessiveness of individual punitive awards should be governed by the deferential "rational basis" standard of review applicable to state regulations that do not infringe fundamental rights. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

In assessing the rational basis for punitive damages, this Court should give full consideration to the important role punitive damages play in advancing state policy objectives. Far from being a mere windfall to successful private litigants, punitive damages are an important adjunct to *amici's* efforts to enforce laws protecting consumers, the environment, and the public health and welfare in general.

First, the availability of punitive damages encourages private litigants to vindicate their rights in court. Particularly in cases such as the present one where out-of-pocket losses are slight and noneconomic losses are uncertain, the availability of punitive awards provides a meaningful spur for private citizens to redress injuries done to them. Indeed, this Court recognized in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), that one important function of punitive, treble damages under the antitrust laws is to encourage private enforcement.

Second, punitive awards serve law enforcement purposes by providing an effective deterrent to conduct which might otherwise be profitable. The vast majority of States have – after substantial legislative deliberation in recent years – decided to retain punitive damages as an important component of a comprehensive strategy for maximizing adherence to consumer, environmental, and

public health and safety laws. Indeed, many state statutes – like their federal counterparts – provide for punitive damages or civil fines in the event of violation.

Thus, by encouraging private enforcement and deterring unlawful conduct, punitive damages provide a needed supplement to the States' public enforcement of consumer, environmental, and health and safety regulation. The availability of punitive damages is especially important in the present context because insurance fraud is involved. Insurance is both critical to the personal security of every citizen and the source of frequent fraud, bad faith refusals to pay claims, and other iniquities.

2. Procedural Due Process Review. State procedural mechanisms for determining punitive damages should also receive deferential scrutiny. The common law approach to punitive damages at issue in this case is not materially different from the approach that has been traditionally used by States for assessing punitive awards. This Court should give great deference to that historical experience, as the Court typically does when assessing the constitutionality of traditional forms of civil adjudication. See *Burnham v. Superior Court of California*, 110 S.Ct. ___, 58 U.S.L.W. 4629 (1990).

* * *

Finally, *amici* urge this Court not to place any firm constitutional cap on punitive awards, or to require States to adopt a particular multiple of compensatory damages as a limit on punitive awards – either as a matter of substantive or procedural due process. The calculation of what amount is appropriate to deter a defendant and

others similarly situated from repeating particular harmful conduct generally cannot be reduced to a mathematical formula. Any reasonable calculation of deterrence must take into account the probable gain from the harmful conduct generally (and not only in the particular case), the likelihood that the conduct will be detected, and the difficulty of meeting applicable burdens of proof even if the conduct is detected. Thus, even if compensatory damages are not great in an individual case, a substantial punitive award may be necessary to achieve a State's deterrent objective. Imposing a constitutional requirement that punitive damages be a particular multiple of compensatory damages would risk thwarting effective deterrence.¹

II. PRINCIPLES OF FEDERALISM AND JUDICIAL RESTRAINT DICTATE THAT THIS COURT LEAVE THE ISSUE OF "REFORMING" PUNITIVE DAMAGES TO STATE LEGISLATURES AND COURTS.

This Court has repeatedly made clear that, under the Due Process Clause, States must be granted wide latitude to remedy

what are found to be injurious practices in their internal commercial and business affairs. . . . [T]he due process clause is [not] to be so

¹ In any event, the punitive award in this case appears to be approximately 4 to 5 times the compensatory award to respondent Cleopatra Haslip, when both her out-of-pocket loss and her claim for emotional distress are included as compensatory damages. Such a ratio presumably falls well within any hypothetical limit this Court might set.

broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 107 (1978) (quotation omitted); accord *Lincoln Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-537 (1949). This principle has often been applied in cases involving due process challenges to the procedures through which States seek to vindicate public goals. See *Chandler v. Florida*, 449 U.S. 560 (1981); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96.

As Justice O'Connor has persuasively noted, "state innovation is no judicial myth." *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring). Unemployment insurance, minimum wage laws for women and children, and women's suffrage all originated in the States. *Id.* at 789. Similarly, "[a]fter decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation." *Id.* To promote the development of such sound public policies, this Court has recognized the need to leave breathing space for experimentation.

Indeed, this Court's due process jurisprudence has come to adopt the admonition of Justice Brandeis's dissent from a due process ruling restricting state economic regulation in *New State Ice Co. v. Liebmann*:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a

single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. . . . But in the exercise of this high power, we must be ever on our guard lest we erect our prejudices into legal principles.

285 U.S. 262, 311 (1932). See *Chandler v. Florida*, 449 U.S. at 107.

In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), the Court vindicated these fundamental principles of federalism and judicial restraint when it declined to address constitutional arguments for "reform" of state punitive damages law. The Court observed that such review

would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the . . . State legislature might choose to enact legislation addressing punitive awards for bad-faith refusal to pay insurance claims; failing that, the . . . state courts may choose to resolve the issue by relying on the state constitution or on some other adequate and independent non-federal ground.

Id. at 79-80 (footnote omitted). The same bedrock principles apply with particular force here.

The imposition of punitive damages for insurance fraud is nothing more than a common law method of regulating economic conduct injurious to the public health and welfare. It is in precisely the area of economic

regulation that this Court has stressed the need to leave States with maximum latitude to "experiment with economic problems," *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), and to promote the public health and safety generally. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955). Because no fundamental constitutional right such as First Amendment rights to free expression or free exercise of religion is generally implicated, state punitive damages law generally falls within the wide ambit of economic regulation to which this Court accords maximum deference.²

Constitutionalizing the law of punitive damages would, furthermore, thwart an active re-examination presently underway in the States. The majority of States have recently put in place a broad array of measures for guiding and limiting the assessment of punitive damages.³ Alabama, Texas and seven other States have

² *Amici* recognize that a different calculus of interests prevails when fundamental First Amendment rights are at stake, and that the scope of state authority to authorize punitive damages may be correspondingly confined. *E.G.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

³ See Ala. Code § 6-11-20 *et seq.* (Supp. 1988); Alaska Stat. § 09.17.020 (Supp. 1988); Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990); Colo. Rev. Stat. §§ 13-21-102, 12-25-127 (Supp. 1986); Conn. Gen. Stat. § 54-240(b) (Supp. 1989); Fla. Stat. Ann. §§ 768.72 through .74 (West Supp. 1989); Ga. Code Ann. § 51-12-5.1 (Supp. 1989); Idaho Code § 6-1604 (Supp. 1989); Ill. Ann. Stat. ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989); Ind. Code Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1 (West 1987); Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989); Ky. Rev. Stat. §§ 411.184, 411.186 (1988); Minn. Stat. Ann. §§ 549.191, 549.20

(Continued on following page)

legislated caps on punitive awards in at least some kinds of cases.⁴ Borrowing from the prevailing model for sentencing in capital punishment cases, several States have bifurcated the liability and damages phases of trials in which punitive damages are at issue.⁵ Other States have specified additional standards for guiding the determination or review of punitive awards.⁶ Some States have followed Alabama's common law rule and excluded evidence of a defendant's net worth from jury consideration.

(Continued from previous page)

(West 1988); Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990), 537.675 (Vernon Supp. 1988); Mont. Code Ann. § 27-1-221 (1987); Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988); N.J. Stat. Ann. § 2A:58C-5 (West 1987) (applicable to product liability cases); N.D. Cent. Code § 32-03.2-11 (Supp. 1987); Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. §§ 30.925 (applicable to product liability cases) 18.540, 41.315 (1987); S.C. Code Ann. § 15-33-135 (Supp. 1988); S.D. Rev. Code § 21-1-4.1 (1987); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 *et seq.* (Vernon Supp. 1990); Utah Code Ann. § 78-18-1 (Supp. 1989); Va. Code Ann. 8.01-38.1 (Supp. 1989).

⁴ See Ala. Code § 6-11-21 (Supp. 1988); Colo. Code § 13-21-102(1)(a) (Supp. 1986); Fla. Stat. Ann. § 768.73(1)(a) (West Supp. 1989); Ga. Code Ann. § 51-12.5.1(g); Kan. Civ. Proc. Code Ann. § 60-3701(e) (Vernon Supp. 1989); Nev. Rev. Stat. Ann. § 42.005.1 (Supp. 1989); Okla. Stat. Ann. tit. 23 § 9 (West 1987); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1990); Va. Code Ann. § 8.01-38.1 (Supp. 1989).

⁵ *E.g.*, Ga. Code Ann. § 51-12.5.1(d)(2) (Supp. 1989).

⁶ Fla. Stat. Ann. §§ 768.73-768.74 (West Supp. 1989); Kan. Civ. Proc. Code Ann. § 60-3701 (Vernon Supp. 1989); Ky. Rev. Stat. § 411.186 (1988); Minn. Stat. Ann. § 549.20 (West 1988); Mont. Code Ann. § 27-1-221 (1987); N.J. Stat. Ann. § 2A:58C-5 (West 1987); Or. Rev. Stat. § 30.925 (1987).

Several States have increased the burden of proof plaintiffs must meet in order to obtain punitive awards.

The variety and scope of these state measures make several points clear. First, the extent to which traditional methods for assessing punitive damages should be reformed is not a question readily amenable to judicial resolution. To the extent punitive damages are perceived as being in need of reform, there is no consensus as to what shape those reforms should take. Different States are trying different approaches, which embody varying values and policies. Important empirical questions as to whether, and to what extent, punitive liability has increased are at the heart of this policymaking enterprise. Reforms also require difficult policy tradeoffs between deterring consumer harm and promoting a favorable climate for attracting and developing business.⁷ These are questions that should be left to the elected representatives of the People in their respective States.

Second, it is far from clear that the principal "reform" the petitioner in this case seeks – more specific standards to guide jury assessment of punitive awards – is generally perceived as a necessary, or even a sensible, constraint on punitive damages. Most state legislatures have considered and passed some type of punitive damages reform measure, but very few have opted for greater specificity in jury instructions or appellate review standards. Even

⁷ A State's decision to impose an upper limit on punitive awards may have little to do with any perceived risks posed by punitive damages generally, but it does reflect a desire to create a more favorable business climate and thereby gain an advantage over other States in attracting new businesses.

in those States elaborating on the traditional common law standards for assessing punitive awards, the criteria identified do not provide any greater specificity than that achieved by the common law in Alabama after *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). That extensive scrutiny in state legislatures and courts has not resulted in reforms of the type the petitioner seeks is a powerful indication that the traditional common law standards for assessing punitive damages are neither unfair to defendants nor a cause of escalating punitive awards.

Third, constitutionalizing punitive damages in the way petitioner urges would represent a substantial intrusion on state sovereignty. Petitioner and its supporting *amici* contend that even judicial common law articulation of standards more definite than those of the common law is inadequate because due process requires legislative revision of the common law methods for assessing punitive damages. This is little short of an affront to state sovereignty. So long as a State's process for deciding punitive damages is not fundamentally unfair, the Due Process Clause is satisfied. Nothing in the constitutional text or history, or this Court's interpretations of it, even remotely supports the idea that a State may not rely on common law development of standards for determining punitive damages.

III. ACCEPTANCE OF PETITIONER'S PROPOSED EXPANSION OF DUE PROCESS WOULD EFFECTIVELY TURN THIS COURT AS WELL AS LOWER FEDERAL AND STATE COURTS, INTO ONGOING REGULATORS OF THE SUFFICIENCY OF STATE PROCEDURES FOR ASSESSING PUNITIVE DAMAGES.

As this Court is well aware, the effort to constitutionalize the rules governing capital sentencing has produced less than satisfactory results. The due process arguments advanced by petitioner here are strikingly similar to those that led to this Court's decisions in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia* 428 U.S. 153 (1976). Indeed, the petitioner in this case explicitly relies on those decisions to support its proposed expansion of due process requirements. See Petition for Certiorari at 21, 28; Brief of Petitioner at 16, 33, 44. Accordingly, there is every reason to expect that resourceful counsel will bring to the courts an endless progression of due process challenges to punitive damages standards.

Acceptance of the expanded due process principles urged by the petitioner will thus invariably enmesh this Court – as well as state courts and lower federal courts – in an ongoing series of judgments about whether particular substantive standards for assessing punitive awards are sufficiently concrete to pass constitutional muster.⁸

⁸ Compare, in the capital punishment context, *Walton v. Arizona*, 110 S. Ct. ___, 1990 WL 85286 (1990) (vagueness challenge to Arizona statutory factor); *Clemons v. Mississippi*, 494 U.S. ___ (1990) (vagueness challenge to Mississippi statutory

(Continued on following page)

whether punitive awards can stand when one factor on which a jury relied is subsequently invalidated on appeal,⁹ whether proportionality review is required,¹⁰ and a host of other challenges analogous to those that have been brought in the capital punishment context. Indeed, it is far from inconceivable that restrictions on juror discretion in assessing punitive damages will be challenged as violating due process because they *exclude* relevant information from the decisionmaker.¹¹

Amici respectfully urge this Court to pretermitt this problem at the outset by refusing petitioner's invitation to constitutionalize the law of punitive damages.

IV. IF ACCEPTED BY THIS COURT, THE PETITIONER'S DUE PROCESS ARGUMENTS WOULD JEOPARDIZE THE CONSTITUTIONALITY OF CRIMINAL SENTENCING SCHEMES.

If the Due Process Clause is extended in the way urged by the petitioner in this case, the constitutionality of state criminal sentencing procedures will be thrown into doubt.

(Continued from previous page)

factor); *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988) (vagueness challenge to Oklahoma statutory factor); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (vagueness challenge to Georgia statutory factor).

⁹ Compare *Zant v. Stephens*, 463 U.S. 862 (1983).

¹⁰ Compare *Pulley v. Harris*, 465 U.S. 37 (1984).

¹¹ Compare *Lockett v. Ohio*, 438 U.S. 586 (1978).

This Court has made clear that the States generally are "free to decide in sentencing how much discretion should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978). Even in capital cases, members of this Court have repeatedly recognized that sentencing does not involve the same type of decisionmaking as does deciding whether a defendant has violated a substantive criminal provision:

In returning [a] verdict [on guilt or innocence], the jury decides whether the defendant committed a specific set of defined acts with a particular mental state. . . . The decision by a . . . death jury in the final stage of its deliberations is significantly different from the model just described. A wide range of evidence is admissible on literally countless subjects. . . . In considering this evidence, the jury does not attempt to decide whether particular elements have been proved, but instead makes a unique, individualized judgment regarding the punishment that a particular person deserves.

Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in the judgment). Similarly, a four-Justice plurality in *Barclay v. Florida* made clear that this Court's precedents "have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors." 463 U.S. 939, 950 (1983).

Federal and state courts have echoed these fundamental principles in uniformly rejecting due process challenges to the discretion afforded criminal sentencers. In *United States v. Wivell*, 893 F.2d 156, 160 (8th Cir. 1990), for example, the court held that "a defendant's due process

rights are unimpaired by the complete absence of sentencing guidelines." Other decisions have similarly rejected due process challenges to the unfettered discretion of judges to set criminal sentences. See e.g., *Rogers v. State*, 582 S.W.2d 7, 13-14 (Ark. 1979) (en banc); *Smith v. Follette*, 445 F.2d 955 (2d Cir. 1971); *United States v. Florence*, 741 F.2d 1066 (8th Cir. 1984); *United States v. Davis*, 801 F.2d 754 (5th Cir. 1986), cert. denied, 108 S. Ct. 2908 (1988); *United States v. Baker*, 429 F.2d 1344 (7th Cir. 1970); *Britton v. Rogers*, 631 F.2d 572 (8th Cir. 1980); cf. *Stevens v. ArmatROUT*, 787 F.2d 1282 (8th Cir. 1986) (upholding constitutionality of sentence of 200 years under statute providing for sentence of "any term of years").

Petitioner Pacific Mutual's due process arguments would cast these previously uncontroversial due process rulings into doubt, and threaten the constitutionality of the common practice of state criminal statutes of leaving wide discretion to fix appropriate sentences. At a minimum, the settled constitutionality of such statutes will be subjected to a vigorous due process assault by the criminal defense bar. In effect, Pacific Mutual's arguments would threaten to turn criminal sentencing into precisely the "mechanical parsing of statutory aggravating factors" that this Court decried in *Barclay*. Such a result would undermine effective law enforcement, and the important policies underlying individualized, discretionary sentencing that is traditional in criminal cases.

The risk of such a result sheds light on the radical quality of Pacific Mutual's proposed expansion of due process. It should be clear to this Court that Pacific Mutual's arguments have no foundation in a principled

understanding of the Due Process Clause, and should therefore be rejected.

CONCLUSION

For all the foregoing reasons, the decision of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

JOHN K. VAN DEKAMP
Attorney General of
California

MICHAEL J. STRUMWASSER
Special Assistant
Attorney General
Department of Justice
3580 Wilshire Boulevard
Suite 800
Los Angeles, California
90010
(213) 736-2102

JIM MATTOX
Attorney General of Texas
Supreme Court Building
Seventh Floor
P.O. Box 12548
Austin, TX 78711
(512) 463-2191

July 16, 1990

DON SIEGELMAN*
Attorney General of
Alabama

GEORGE E. JONES III
Assistant Attorney General
Office of the Attorney
General
11 South Union Street
Montgomery, Alabama
36130
(205) 242-7300

*Counsel of Record

NO. 89-1279

U.S. SUPREME COURT
CLERK

IN THE
Supreme Court of the United States
October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

GLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

ON WRIT OF HABEAS CORPUS TO THE
SUPREME COURT OF ALABAMA

BRIEF OF
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Russ M. Herman, Esq.
520 O'Keefe Ave.
New Orleans, LA 70113
(504) 581-4892
*President, Association of
Trial Lawyers of America*

Jeffrey Robert White, Esq*.
1059 31st St., N.W.
Washington, DC 20007
(202) 965-3500
Attorney for Amicus Curiae
*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. JURY DISCRETION IN ASSESSING PUNITIVE DAMAGES, HISTORICALLY RECOGNIZED AT COMMON LAW, WIDELY ADOPTED AND LONG APPLIED BY AMERICAN COURTS, AND CONSISTENTLY ACKNOWLEDGED BY THIS COURT, COMPORTS WITH DUE PROCESS.	3
A. The Tort Reform Proposals to Limit Punitive Damages Have Been Fully Presented to State Legislatures.	4
B. Civil Remedies and Procedures Rooted in the Common Law and Developed by American Courts in the Light of Reason and Experience Generally Reflect the Principles of Fundamental Fairness Guaranteed by the Due Process Clause.	6
C. The Common Law Rule of Jury Discretion in Determining the Amount of Punitive Damages, Widely Adopted and Long Preserved by American Courts, Does Not Offend Fundamental Fairness	9
D. The Common Law Standards for Punitive Damages are Not Impermissibly Vague Under the Due	

Process Clause	12
E. Jury Verdicts are Not Subject to Due Process Review	13
II. JURY DISCRETION TO ASSESS DAMAGES TO PUNISH AND DETER MISCONDUCT WITHOUT PREDETERMINED LIMITS DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS	13
A. Jury Discretion to Assess Punitive Damages Based on the Facts and Circumstances of the Individual Case is Rationally Related to State Interest in Punishing and Deterring Culpable Violations of Substantive Tort Law.	14
B. Jury Discretion is No Vice	17
C. Predictability is No Virtue	19
III. EXISTING PROCEDURES FOR ASSESSING PUNITIVE DAMAGES SATISFY PROCEDURAL DUE PROCESS	20
IV. THE FREQUENCY, SIZE, AND ECONOMIC IMPACT OF PUNITIVE DAMAGE AWARDS DO NOT WARRANT EXPANSION OF DUE PROCESS IN FAVOR OF WRONGDOERS ..	25
A. There is no "Explosion" in Punitive Damage Awards	26
B. Punitive Damages are Not Harming Innovation and Competitiveness	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases

<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	21, 22
<i>Arab Termite & Pest Control v. Jenkins</i> , 409 So. 2d 1039 (Fla. 1982)	23
<i>Bankers Life & Cas. Co. v. Crenshaw</i> , 483 So. 2d 254 (Miss. 1985)	16
<i>Barry v. Edmunds</i> , 116 U.S. 550 (1886)	10, 23
<i>Browning-Ferris Indus. v. Kelco Disposal Inc.</i> , 109 S. Ct. 2909 (1989)	9, 13
<i>Byrd v. Blue Ridge Rural Elec. Coop.</i> , 356 U.S. 525 (1958)	8
<i>Carlson v. Green</i> , 446 U.S. 14 (1980)	10, 15
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	12
<i>Davidson v. City of New Orleans</i> , 96 U.S. 97 (1877) ...	6
<i>Day v. Woodworth</i> , 54 U.S. (13 How.) 363 (1851) .	6, 10
<i>Deal v. Byford</i> , 127 Ill. 2d 192, 130 Ill. Dec. 200, 537 N.E.2d 267 (1989)	24
<i>Dimick v. Schiedt</i> , 293 U.S. 474 (1953)	8
<i>Dorsey v. Honda Motor Co.</i> , 673 F.2d 911 (5th Cir. 1982)	29
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968)	8, 9, 18

<i>Eichenseer v. Reserve Life Ins. Co.</i> , 881 F.2d 1355 (5th Cir. 1989)	12
<i>Federal Deposit Ins. Corp. v. W.R. Grace & Co.</i> , 691 F. Supp. 87 (N.D. Ill. 1988)	24
<i>Fischer v. Johns-Manville Corp.</i> , 103 N.J. 643, 512 A.2d 466 (1986)	16
<i>Ford Motor Co. v. Durrill</i> , 714 S.W. 329 (Tex. Ct. App. 1986)	16
<i>Grimshaw v. Ford Motor Co.</i> , 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)	16, 17
<i>Hodder v. Goodyear Tire & Rubber Co.</i> , 426 N.W.2d 826 (Minn. 1988)	24
<i>Home Insurance Co. v. American Home Prods. Corp.</i> , 75 N.Y.2d 196, 550 N.E.2d 930 (1990)	24
<i>Huckle v. Money</i> , 2 Wils. 206, 95 Eng. Rep. 768 (K.B. 1763)	10
<i>IBEW v. Foust</i> , 442 U.S. 42 (1979)	18
<i>In re Winship</i> , 397 U.S. 358 (1970)	22
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977)	7
<i>Jackman v. Rosenbaum Co.</i> , 260 U.S. 22 (1922)	11
<i>Johnson v. American Cyanamid Co.</i> , 239 Kan. 279, 718 P.2d 1318 (1986)	29
<i>Kelly v. Robinson</i> , 107 S Ct. 353 (1987)	17
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144 (1963) ..	22

<i>Leonen v. Johns-Manville Corp.</i> , 717 F. Supp. 272 (D.N.J. 1989)	19
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982) ..	20
<i>Louisville & Nashville R.R. v. Street</i> , 164 Ala. 155, 51 So. 306 (1909)	23
<i>Maheu v. Hughes Tool Co.</i> , 569 F.2d 459 (9th Cir. 1971)	13
<i>Man v. Raymark Indus.</i> , 728 F. Supp. 1461 (D. Hawaii 1989)	12
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	9
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	21, 22
<i>McKlesky v. Kemp</i> , 481 U.S. 279 (1987)	11
<i>Missouri Pacific Ry. Co. v. Humes</i> , 115 U.S. 512 (1885) ..	6
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977)	6, 7, 8
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	20
<i>Murray's Lessee v. Hoboken Land & Improvement Co.</i> , 59 U.S.. (18 How.) 272 (1856)	7
<i>Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247 (1981) ..	10
<i>Olson v. Walker</i> , 781 P.2d 1015 (Ariz. App. 1989) ...	23
<i>Palmer v. A.H. Robins Co.</i> , 684 P.2d 187 (Colo. 1984) ..	19

<i>Paul v. Davis</i> , 424 U.S. 693 (1976) ..	12
<i>Poe v. Ullman</i> , 367 U.S. 497 (1961)	7
<i>Rivera v. Minnich</i> , 107 S. Ct. 3001 (1987)	11
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982)	21, 22
<i>Shaffer v. Heitner</i> , 433 U.S. 186 (1977)	11
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984) ..	10
<i>Sturm, Ruger & Co. v. Day</i> , 594 P.2d 38 (Alaska 1979)	23
<i>Thiry v. Johns Manville Corp.</i> , 661 P.2d 515 (Okla. 1985)	23
<i>Tuttle v. Raymond</i> , 494 A.2d 1353 (Me. 1985)	19
<i>United States v. Carolene Prods. Co.</i> , 304 U.S. 144 (1938)	14
<i>United States v. Halper</i> , 109 S. Ct. 1892 (1989)	22
<i>Usery v. Turner Elkhorn Mining Co.</i> , 428 U.S. 1 (1976)	14
<i>Walters v. National Ass'n of Radiation Survivors</i> , 473 U.S. 305 (1985)	25
<i>Wangen v. Ford Motor Co.</i> , 97 Wis. 2d 260, 294 N.W.2d 437 (1980)	23
<i>Williamson v. Lee Optical Co.</i> , 348 U.S. 483 (1955) ..	14
<i>Witherspoon v. Illinois</i> , 391 U.S. 510 (1968)	18

Constitutions, Statutes, and Rules

U.S. Const. amend. VII	8
U.S. Const. amend XIV	passim
42 U.S.C. § 1983	10, 11

Other Authorities

American Tort Reform Association, Tort Reform Accomplishments, 1986-1989 (1989)	5
C. Antieau, 1 Modern Constitutional Law (1969)	9
Cooter, <i>Economic Analysis of Punitive Damages</i> , 56 So. Cal. L. Rev. 79 (1982)	15
S. Daniels and J. Martin, <i>Myth and Reality in Punitive Damages</i> (American Bar Foundation), 75 Minn. L. Rev. ____ (Oct. 1990)	5, 28
Ghiardi, <i>Punitive Damage Awards: An Expanded Judicial Role</i> , 72 Marquette L Rev 33 (1988) ...	24
J. Guinther, <i>The Jury in America</i> (1988)	18
Harris, <i>Rereading Punitive Damages: Beyond the Public/Private Distinction</i> , 40 Ala. L. Rev. 1079 (1989)	18
H. Kalven and H. Zeisel, <i>The American Jury</i> (1966)	19
Keeton, Owen, and Montgomery, <i>Cases and Materials on Product Liability and Safety</i> (1980)	16

W. Landes and R. Posner, <i>The Economic Structure of Tort Law</i> (1988)	27
Learner, <i>Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties</i> , 18 Harv. J. on Legis. 143 (1981)	5
Morris, <i>Punitive Damages in Tort Cases</i> , 46 Harv. L. Rev. 1173 (1931)	15
Note, 16 Cumberland L. Rev. 151 (1985-86)	23
Owen, <i>Problems in Assessing Punitive Damages Against Manufacturers of Defective Products</i> , 49 U. Chi. L. Rev. 1 (1982)	24
M. Peterson, S. Sarma, M. Shanley, <i>Punitive Damages: Empirical Findings</i> (RAND Institute for Civil Justice 1987)	24, 26
Report of the Special Committee on Punitive Damages, <i>Punitive Damages: A Constructive Examination</i> (ABA 1986)	27
Report to the American Bar Association by the Special Committee on the Tort Liability System, <i>Towards a Jurisprudence of Injury</i> (1984)	15
Restatement (Second) of Torts § 908(2)(1979)	4, 23
Reuter, <i>The Economic Consequences of Expanded Corporate Liability</i> (RAND 1988)	28, 29
L. Schlueter & K. Redden, <i>Punitive Damages</i> (2d ed. 1989)	10, 23
L. Tribe, <i>American Constitutional Law</i> (2d ed. 1988)	8

U.S. General Accounting Office, <i>Product Liability: Verdicts and Case Resolution in Five States</i> (Sept. 1989)	24, 27
Wade, <i>An Evaluation of the "Insurance Crisis" and Existing Tort Law</i> , 24 Houston L. Rev. 81 (1987)	5
Wade, <i>On the Nature of Strict Tort Liability for Products</i> , 44 Miss. L.J. 825 (1973)	15
Weber, <i>Product Liability: The Corporate Response</i> (The Conference Board, 1987)	29
Wright, <i>Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure</i> , 21 U.C. Davis L. Rev. 1141 (1988)	5
"Companies Search For Next \$1 Billion Drug," New York Times, Nov. 28, 1988	30

No. 89-1279

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF OF
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The Association of Trial Lawyers of America ["ATLA"] is a national voluntary bar association whose approximately 65,000 members primarily represent those who have suffered personal injury, deprivation of civil rights, or economic harm as the result of tortious misconduct.

Justice in America is administered, in large part, by the American people themselves. The jury is a distinctively democratic institution, reflecting the common sense and conscience of the community, beholden to no personal

ambition, economic interest, or political constituency. The value of the independent jury is reflected in the array of special interests which have mounted an intense and heavily financed campaign to undermine its role under the guise of "tort reform." The heart of the challenge to punitive damages in this case is an attack on the jury.

ATLA therefore respectfully submits this brief as *amicus curiae*. The written consents of both parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

In this case, the Court is once again invited into the heated controversy surrounding punitive damage awards in civil lawsuits. Those facing liability have mounted a well-orchestrated and lavishly financed campaign which has urged nearly every state legislature to impose limits on this common-law remedy. Having met with limited success, the tort reform lobby now calls upon this Court to impose such limits as a matter of due process.

The central issue is clear and relatively narrow: May the states continue to employ the common-law rule that the amount of punitive damages is to be determined by the jury, within the proper exercise of its discretion and based on the evidence in the particular case. Or must each state establish either predetermined limits on damages or procedures more favorable to defendants than those already afforded in civil actions.

The focus of attack is the very cornerstone of our civil justice system: the jury. In a peculiar inversion of the familiar values this Court has associated with the Fourteenth Amendment, the most powerful interests in society seek relief from "oppression" -- not by government, but by the institution which the common law has devised as a check against the power of government.

Amicus suggests that the common law is not amenable to the due process analysis applied to statutes, regulations,

or administrative actions. Common-law procedures or remedies which have been widely adopted and followed by the states over an extended period of time, may generally be deemed consistent with the traditional notions of fairness preserved by the Due Process Clause.

Even under the due process analysis generally applied to positive enactments, the common-law rule followed by the Alabama court passes constitutional muster. Reliance upon jury discretion, within appropriate judicial controls, is rationally related to the legitimate state interest in punishing and deterring violations of substantive tort law. Moreover, since the property interest at stake and the risk of error are not significantly greater than those involved in jury assessment of compensatory damages, procedural due process does not demand additional safeguards beyond the considerable protection afforded defendants in private civil actions.

Finally, empirical evidence contradicts the tort reformers' arguments that large awards are the result of jury bias or sympathy and that they undermine the competitiveness of American industry. There is no "explosion" in the frequency and size of punitive damage awards, especially in personal injury and product liability suits. Additionally, punitive awards neither deter innovation nor place American businesses at a competitive disadvantage with foreign companies.

ARGUMENT

I. JURY DISCRETION IN ASSESSING PUNITIVE DAMAGES, HISTORICALLY RECOGNIZED AT COMMON LAW, WIDELY ADOPTED AND LONG APPLIED BY AMERICAN COURTS, AND CONSISTENTLY ACKNOWLEDGED BY THIS COURT, COMPORTS WITH DUE PROCESS.

A. The Tort Reform Proposals to Limit Punitive Damages Have Been Fully Presented to State Legislatures.

The central issue in this case is clear and relatively narrow. Neither the constitutionality of punitive damages nor the state's wisdom in allowing punitive damages in a particular cause of action is before the Court. Rather, Petitioner Pacific Mutual attacks the means the state has chosen for determining the amount of damages.

The Alabama court adhered to the common law rule followed in the great majority of states: Where recovery of punitive damages is permitted under state law and supported by the evidence in the case, it is the responsibility of the jury, based upon the evidence and in the proper exercise of its discretion, to determine the amount of damages appropriate to punish and deter defendant's misconduct. *See* Restatement (Second) of Torts § 908(2)(1979). Pacific Mutual argues that this rule leaves the jury "free to punish selectively and arbitrarily and to give free reign to bias, prejudice and wealth distribution inclinations." Brief of Petitioner at 10. Due process requires states to restrict jury discretion by setting a predetermined "range of permissible punishment," *id.* at 26, and imposing heightened procedural safeguards. *Id.* at 37-40.

Does the common law rule place too much power in the hands of jurors? Legislators might reasonably differ. Indeed many of the amici who appear in support of Pacific Mutual in this case are major participants in the tort reform lobby which has placed its proposed limitations on punitive damages before nearly every state legislature during the past five years.¹ As result of this well-

¹For example, the American Tort Reform Association, Association for California Tort Reform, Chamber of Commerce of the United States, Defense Research Institute, National Association of Manufacturers, Pharmaceutical Manufacturers Association, and Product Liability Alliance.

orchestrated and lavishly financed lobbying effort,² about 22 states have enacted some elements of the tort reformers' punitive damages agenda. However, only nine have imposed limits on the amounts of punitive awards. *See* American Tort Reform Association, *Tort Reform Accomplishments, 1986-1989* 18-20 (1989).³ The tort reform lobby now asks this Court to impose tort reform upon the states as a constitutional imperative. The relief sought, as one amicus bluntly states, is for "this Court to require state legislatures to specify when punitive damages are permissible and in what amounts." Brief of Amicus Curiae Defense Research Institute at 13.

ATLA respectfully suggests that deference to legislative judgments extends not only to those states which have enacted tort reforms, but also to the larger number which have preserved the common law remedy of punitive damages.

²The anxiety-laden rhetoric of the tort reformers' intensely politicized campaign has been compared to the recent marketing tactic known as "slice-of-death" advertising. "Consequently, the current debate over punitive damages has become not a matter of rational discourse, but one of public relations, propaganda, and the mobilization of prejudice and fear. Daniels and Martin, *Myth and Reality in Punitive Damages* 13 (American Bar Foundation Working Paper 1990), scheduled for publication at 75 Minn. L. Rev. ____ (Oct. 1990).

³The tort reform lobbying effort has been sharply criticized by scholars as an exercise in "raw interest group politics" employing "smokescreens and false alarms," Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1148 & 1164 (1988); and "intentional misrepresentation." Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 Houston L. Rev. 81, 96 (1987). These allegations are of particular concern since those whose rights are "reformed" are, by definition, unknown future victims of tortious misconduct, and therefore politically powerless. *See* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 Harv. J. on Legis. 143, 189 (1981).

B. Civil Remedies and Procedures Rooted in the Common Law and Developed by American Courts in the Light of Reason and Experience Generally Reflect the Principles of Fundamental Fairness Guaranteed by the Due Process Clause.

It is not often that this Court is called upon to rewrite state tort law. The relief sought in this case is all the more extraordinary in urging the Court to strike down a rule which was not created by statute, but is a well-established principle of the common law." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). Pacific Mutual and various supporting amici ask this Court to pretend that the rule of jury discretion was established by Alabama's legislature. They proceed to find the rule wanting in substantive and procedural due process under the tests applied to statutes, administrative decisionmaking, and other governmental acts. ATLA suggests that this analysis is strained, at best, and unnecessary.

The common law and the constitutional guarantee of due process grow out of the same historical roots and share the capacity to adapt to society's evolving notions of justice. Every state (excepting Louisiana) adopted the common law of England as state law. *See Davidson v. City of New Orleans*, 96 U.S. 97 (1877). While criminal law was quickly codified in statute, much of tort law consists of common law, as developed by the courts in the light of reason and experience.

The Due Process Clause is not "a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512 (1885). Nor does fundamental fairness depend upon the personal "predilections" of judges, or even Justices. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

Instead, the Due Process Clause receives its meaning from "what history teaches are the traditions from which

[this country] developed as well as the traditions from which it broke." *Moore, supra*, at 502, quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). In enshrining due process of law in the Constitution, the drafters plainly had in mind the set of remedies and procedures familiar to them at common law. Due process, as this Court has explained reflects this origin:

To what principles, then, are we to resort to ascertain whether this process enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276-77 (1856).

More recently, Justice Powell reemphasized this view that the drafters of the Due Process Clause intended to give Americans "the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). The Court there looked to the common law for the standard against which state action -- corporal punishment of school children -- should be measured. *Id.* at 675-76. Indeed, the Court indicated that lack of notice or hearing might well have violated due process but for the availability of the common-law tort remedy for excessive punishment. *Id.* at 674. This result is consistent "with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law." *Id.* at 679 n.47.

Few principles of the common law are as firmly

rooted and widely embraced in America as the broad discretion of juries to make factual determinations in civil cases. It is an "essential characteristic" of the federal system under the influence -- if not the command -- of the Seventh Amendment. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958). This Court has held that the Seventh Amendment specifically protects the right to have a jury assess damages, adding:

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1953).

The notion that remedies and procedures developed and applied by the common law courts may themselves be inimical "to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968), is anomalous. What shall be the measure of fundamental fairness if not the common law?⁴ Cut loose from its historical moorings, the Due Process Clause would indeed reflect only the private notions of judges or Justices. This Court has warned that "As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

⁴This is not to say that elements of the common law cannot be modified by legislation. However, "The common law has nonetheless served as a valuable tool in elucidating the meaning of liberty, and its insights should be preserved as suggestive, if not authoritative for constitutional analysis." L. Tribe, *American Constitutional Law* 1311 (2d ed. 1988).

C. The Common Law Rule of Jury Discretion in Determining the Amount of Punitive Damages, Widely Adopted and Long Preserved by American Courts, Does Not Offend Fundamental Fairness.

The meaning of due process is not, of course, frozen in the mold of the common law of England. The common law itself is a living thing. American judges, primarily state court judges, continue to refine, modify, or reject the rules of the common law in the light of reason, experience, and contemporary notions of justice. ATLA suggests that the question of whether a common law remedy or procedure offends traditional principles of fundamental fairness can generally be answered by looking to the experience of the states, and the guidance of this Court, over the course of a significant period of time.⁵

This Court's experience has been that "Procedures in civil litigation long sanctioned by the passage of time and widely used throughout the United States are almost certain to satisfy the Supreme Court as being due proceedings at law, or due process of law." C. Antieau, 1 *Modern Constitutional Law* 541 (1969). The common-law principle which vests broad discretion in the jury to determine the amount of punitive damages based on the circumstances of the case is clearly within this standard.

The practice of awarding punitive damages was, of course, well recognized at common law prior to the drafting of the Constitution. *Browning-Ferris Indus. v. Kelco Disposal Inc.*, 109 S. Ct. 2909, 2919 (1989). The principle of jury discretion was an integral part of this remedy from its very inception. *Id.* at 2920 n.20, quoting Lord Camden's

⁵A useful parallel is found in the incorporation of specific constitutional guarantees into the Fourteenth Amendment. On whether a specific constitutional procedure is required by due process, the Court has given great weight to its prevalence among the states. *See Mapp v. Ohio*, 367 U.S. 643, 651-52 (1961); *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968).

upholding "exemplary damages" based on the jury's discretion in determining the amount of damages in tort actions in *Huckle v. Money*, 2 Wils. 206, 95 Eng. Rep. 768 (K.B. 1763). See L. Schlueter & K. Redden, *Punitive Damages* 6-9 (2d ed. 1989) ("Lord Camden's recognition of the jury's unfettered discretion in awarding damages was firmly rooted in English legal tradition.")

The common-law rule was widely adopted by American courts. Prior to the Fourteenth Amendment, this Court recognized that punitive damages were "a well established principle of the common law" in which the determination of the amount "has always been left to the jury, as the degree of punishment to be inflicted must depend on the peculiar circumstances of the case." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). The Court later noted that the common-law remedy of punitive damages was widely accepted by the states, and that "nothing is better settled than that, in such cases . . . it is the peculiar function of the jury to determine the amount by their verdict." *Barry v. Edmunds*, 116 U.S. 550, 565 (1886). Presently at least forty-five states continue to permit juries to assess punitive damages in appropriate circumstances. L. Schlueter & K. Redden, *Punitive Damages* § 18.1(A) (2d ed. 1989).

Not only has this Court recognized that punitive damages "have long been a part of traditional state tort law," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (upholding a \$10 million punitive damage award), the Court has viewed punitive damages, including the discretion accorded to juries, as an important remedy in furthering federal interests. The Court explained in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981), that by "allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [42 U.S.C. § 1983] directly advances the public's interest in preventing repeated constitutional deprivations." See also *Carlson v. Green*, 446 U.S. 14, 22 n.9

(1980) ("punitive damages may be the only significant remedy available in some §1983 actions where constitutional rights are violated but the victim cannot prove compensable injury.").

ATLA submits that a common law rule which has enjoyed such wide acceptance and longstanding application is entitled to "a powerful presumption" of fundamental fairness *Rivera v. Minnich*, 107 S. Ct. 3001, 3003 (1987).⁶

It is possible that, following a dramatic change in circumstances or social values, what once conformed to notions of fairness may be seen to offend traditional notions of fair play and substantial justice. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). Such a case is not before this Court. The evil Pacific Mutual complains of, the possibility of arbitrary verdicts, has been a characteristic of the rule of jury discretion since its inception. Moreover, there is no indication that society's notions of justice have so changed that entrusting important matters to juries is viewed as intolerable. Indeed this Court has recently stated, in a case involving the death penalty:

the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'build discretion, equity and flexibility into a legal system.'

McKlesky v. Kemp, 481 U.S. 279, 331 (1987).

ATLA urges this Court to hold that the Alabama rule permitting juries to determine the amount of punitive damages conforms to such a widely adopted and long practiced common law rule that it does not offend the Due

⁶Or, as Justice Holmes remarked, "if a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

Process Clause.

To hold otherwise would drastically change the nature and scope of this Court's judicial intervention under the auspices of due process. Much of state tort law is a large and intricate tapestry woven by the orderly process by which the courts adapt, extend, and refine the time honored principles inherited from generations past. To commence unraveling the rules governing punitive damages provides no stopping point. Should due process restrict a jury's discretion in assessing noneconomic damages, pain and suffering, or emotional distress? Nor, having taken the first step, is there any principled basis for this Court to deny due process scrutiny of strict products liability, the informed consent doctrine, or other common-law rules.

This Court has consistently "rejected reasoning that 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" *Daniels v. Williams*, 474 U.S. 327, 332 (1986), quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976). It is a door which should remain shut.

D. The Common Law Standards for Punitive Damages are Not Impermissibly Vague Under the Due Process Clause.

The crucial distinction between common law rules and positive enactments also resolves Pacific Mutual's claim that the standards for awarding punitive damages are unconstitutionally vague. Provisions of the common law, almost by definition, acquire commonly accepted meaning through application by the courts. Consequently, courts have unanimously held that case law provides sufficient notice to tortfeasors and standards for juries as to what conduct will result in punitive damages and the level of potential liability. See, e.g., *Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355, 1365-66 (5th Cir. 1989); *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1465 (D. Hawaii 1989). The void-for-vagueness doctrine does not require that the precise amount of a punitive damage award be known prior

to trial. *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 480 (9th Cir. 1971).

E. Jury Verdicts are Not Subject to Due Process Review.

Pacific Mutual argues that, apart from the rules governing punitive damage awards generally, the verdict itself violated its "due process right to be free of grossly excessive, disproportionate damage awards." Brief of Petitioner at 32. Pacific Mutual submits that punitive awards must satisfy not only the common law test of excessiveness, but must also be proportional to criminal fines for similar misconduct. *Id.* at 34-35.

This argument is clearly precluded by the Court's decision in *Browning-Ferris, Indus. v. Kelco*, 109 S. Ct. 2909 (1989). Part IV of the majority opinion, in which all members of the Court concurred, states:

In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.

109 S. Ct. at 2922. Indeed, this Court rejected, even as a matter of federal common law, a standard of excessiveness which "would require us to ignore the distinction between the state and federal law issues," *id.*, "or to take steps which ultimately might interfere with the proper role of the jury." *Id.* at 2923 n.26.

ATLA suggests that these imperatives apply with even greater force against imposing such a standard upon state courts.

II. JURY DISCRETION TO ASSESS DAMAGES TO PUNISH AND DETER MISCONDUCT WITHOUT PREDETERMINED LIMITS DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.

Even if this Court accepts the premise that a common law remedy is subject to the same due process analysis applied to statutes, regulations or other governmental decisionmaking, ATLA suggests that jury discretion clearly passes constitutional muster.

A. Jury Discretion to Assess Punitive Damages Based on the Facts and Circumstances of the Individual Case is Rationally Related to State Interest in Punishing and Deterring Culpable Violations of Substantive Tort Law.

Pacific Mutual contends that the rule of jury discretion in assessing punitive damages is fundamentally unfair for two reasons: First, "arbitrary, selective punishment, at the whim of the particular jury or court, becomes the rule, giving free reign to bias and prejudice," and, second, "No fair warning is given of the amount of punishment." Brief of Petitioner at 24. To eliminate these evils of arbitrariness and unpredictability, due process demands that states, preferably state legislatures, "set the range of permitted punishment by way of punitive damages prior to the acts involved." *Id.* at 26.

"It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The "rational basis" standard is broadly deferential to the states, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955); economic regulation will be upheld if any set of facts known or reasonably inferable supports it. See *United States v. Carclene Prods. Co.*, 304 U.S. 144, 153 (1938). As noted earlier, the great majority of states preserve the common-law rule which calls upon the jury to assess punitive damages based on the facts and circumstances of the individual case. ATLA submits that this decision is not

irrational.

A claim for punitive damages is not an independent cause of action. It is merely an additional remedy to punish and deter particularly culpable violations of the state's substantive law of torts.

The purpose of that body of law is to protect the health, property, economic rights and civil rights of citizens not only by compensating those whose rights are invaded, but also by punishing and deterring misconduct. This is the very basis of the "fault" principle in tort law. Deterrence is a "strong thread running through tort law." Report to the American Bar Association by the Special Committee on the Tort Liability System, *Towards a Jurisprudence of Injury* 4-3 (1984). In addition, "the role that punishment actually plays in tort law . . . provides a mediate useful outlet for the community sense of justice." *Id.* at 4-172. See also Cooter, *Economic Analysis of Punitive Damages*, 56 So. Cal. L. Rev. 79, 137 (1982) ("there is now a rich body of academic literature supporting the view that a primary purpose of tort liability rules is to discourage inappropriate behavior on the part of accident causers."); Morris, *Punitive Damages in Tort Cases*, 46 Harv. L. Rev. 1173, 1177 (1931) (punitive damages merely increase the severity of the "admonitory" function of compensatory damages). Product liability, for example, seeks not only to compensate victims, but to keep unreasonably dangerous products off the market in the first place. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973).

Compensatory damages alone are not adequate to achieve this goal, particularly where the misconduct is intentional or willful. Actual damages have no relation to the reprehensibility of misconduct. One who drives drunkenly into a crowd of school children might, happily, inflict only a minor injury. Nor do compensatory damages effectively deter violations of constitutional rights which, though valuable, do not entail great monetary consequences. *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980) (in such cases, "punitive damages may be the only

significant remedy). In other situations, such as fraud and bad faith, a defendant may view the misconduct as profitable due to the low probability of getting caught. *See, e.g., Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 271 (Miss. 1985). In the area of product liability:

Compensatory damages are often foreseeable as to amount Anticipation of these damages will allow potential defendants, aware of dangers of a product, to factor those anticipated damages into a cost-benefit analysis and to decide whether to market a particular product. The risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition.

Fischer v. Johns-Manville Corp., 103 N.J. 643, 664, 512 A.2d 466, 477 (1986). A classic example is the Ford Pinto. An internal memo predicted that 180 people would be burned to death and another 180 severely injured by fuel-fed fires, and that the hazard could be eliminated for less than \$11 per car, Ford management nevertheless determined that it was more profitable to pay damages than to fix the car. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348, 384 (1981).⁷ *See also, Ford Motor Co. v. Durrill*, 714 S.W. 329 (Tex. Ct. App. 1986).

In other words, predictable damages may cease to deter and become, in effect, the purchase price for a license to kill.

Nor do criminal penalties provide the necessary punishment and deterrence. As this Court has noted, criminal fines are "often calculated without regard to the harm the defendant has caused," and may lack "precise

⁷Portions of the Ford internal memo referred to, "Fatalities Associated With Crash-Induced Fuel Leakage and Fires," are reprinted in Keeton, Owen, and Montgomery, *Cases and Materials on Product Liability and Safety* 490-91 (1980).

deterrent effect." *Kelly v. Robinson*, 107 S Ct. 353, 362 n.10 (1987). Illustrative again is *Grimshaw*. Ford argued that punitive damages in the case, involving the burning death of one occupant and severe disfigurement of the other, should be limited to the \$50 and \$100 fines for violation of the Vehicle Code. The court responded:

It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of defective products that punitive damages must be of sufficient amount to discourage such practices. Instead of showing that the punitive damage award was excessive, the comparison between the award and the maximum penalties under state and federal statutes and regulations governing automotive safety demonstrates the propriety of the amount of punitive damages awarded.

Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 820, 174 Cal. Rptr. 348, 389 (1981).

Clearly, ATLA submits, the jury's ability to fix the amount of punishment and deterrence based on the circumstances advances the goals of tort law.

B. Jury Discretion is No Vice

The disturbing premise of Pacific Mutual's argument is that juries commonly disregard their oaths and instructions and impose punitive damages based on bias and prejudice. Brief of Petitioner at 24. This indictment is leveled against the American people, a cross-section of whom sit on juries daily across the country. Into the hands of jurors we place the fates of the poor and the powerful. Our reliance on their common sense as well as their sense of the conscience of the community, extends even to ultimate decisions of life and death. *Witherspoon v. Illinois*,

391 U.S. 510, 518 (1968).

It is precisely this virtue of juries -- their reflection of the collective morality of the community -- that the law of punitive damages draws upon. Punitive damages, this Court has recognized, represent the community's condemnation of "reprehensible conduct." *IBEW v. Foust*, 442 U.S. 42, 48 (1979). As the conscience of the community, "The jury may also be the best judge of what amount is necessary to readjust the status of the parties." Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 Ala. L. Rev. 1079, 1111 (1989).

How wisely do juries exercise this discretion? The largest empirical study of actual jury performance, sponsored by the Roscoe Pound Foundation, found that:

Juries overwhelmingly take their duties seriously . . . Juries are evidence-oriented . . . with the personalities of the participants in the trial and other subsidiary matters only of minor concern to them . . . Juries as a group apparently also understand enough of the law that they are able to arrive at legally supportable verdicts in a very large majority of cases. . . The evidence also strongly suggests that jurors rarely increase the size of an award because they think the defendant has ample insurance to cover it, nor do they ordinarily make awards out of sympathy.

J. Guinther, *The Jury in America* 102 (1988). Guinther concludes that "juries are, on the whole, remarkably adept as triers of fact. Virtually every study of them, regardless of research method, has reached that conclusion." *Id.* at 230. Cf., *Duncan v. Louisiana*, 391 U.S. 145, 157 (1968) ("the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them," citing H. Kalven and H. Zeisel, *The American Jury* (1966)).

ATLA suggests that the decision of Alabama and

other states to allow juries to assess punitive damages without a predetermined limit can scarcely be viewed as irrational.

C. Predictability is No Virtue.

Nor does the lack of precise predictability of the amount of punitive awards render state's reliance on jury discretion irrational. The fact is that "the lack of any precise formula by which punitive damages can be calculated is one of the important assets of the doctrine." *Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985). For a company faced with a business decision of willfully pursuing a course of conduct which is unlawful but profitable, "If punitive damages are predictably certain, they become just another item in the cost of doing business," *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo. 1984). "Rather than remove dangerous products from the market, manufacturers may instead accept the risk of paying limited punitive damages." *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284 (D.N.J. 1989), passing along the cost to the very consumers who are endangered!

Making punitive damages awards predictable eviscerates their effectiveness as a deterrent. Due process surely does not require states to, in effect, immunize intentional wrongdoing upon payment of a user fee.

Finally, it is not immediately apparent that the proposed limits are themselves rationally related to eliminating the perceived evils of jury arbitrariness and unpredictability.⁸ A limit on the amount of awards, either

⁸If a limit on punitive damages were indeed essential to due process, this Court might reasonably expect a measure of specificity and agreement on the part of proponents. However, Pacific Mutual asks only for some "upper limit," presumably less than the verdict in this case. The proposals of supporting amici are either hopelessly vague, *see, e.g.*, Brief of The Business Roundtable at 14-15; Brief of Alliance of American Insurers at 23-24. Or they are plainly self-serving, designed to secure the

in absolute terms or as a ratio to compensatory damages, protects against large, but not arbitrary verdicts. Nor are punitive damage awards likely to become highly predictable, since each state legislature is presumably free to establish its own range or ratio.

III. EXISTING PROCEDURES FOR ASSESSING PUNITIVE DAMAGES SATISFY PROCEDURAL DUE PROCESS.

While private parties in civil suits are unquestionably entitled to due process, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982), this Court has held only that the Fourteenth Amendment requires the basic elements of notice and a meaningful opportunity to be heard. *Id.* at 429; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In this case, Pacific Mutual was accorded a full adversary trial on the merits, surrounded by the procedural protections contained in the rules of evidence and civil procedure and judicial review.

Nevertheless, Pacific Mutual argues that these procedures allow juries to assess punitive damages based on their bias, prejudices, or "wealth distribution tendencies." Brief of Petitioner at 17. It contends that defendants facing claims for punitive damages should be entitled to the procedural protections afforded criminal defendants, including proof beyond a reasonable doubt, unanimous jury verdicts, an upper limit on punishment, and separation of liability and punitive damages issues, under this Court's formulation:

[I]dentification of the specific dictates of due process generally required consideration of three distinct

advantage for special interests. For example, City of New York views a ratio between punitive and compensatory damages as "an indispensable standard," at 13, while Arthur Andersen & Co. argues as vehemently that such a ratio would produce "unconstitutionally excessive" awards. At 26.

factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Pacific Mutual apparently concedes that the procedures surrounding compensatory awards satisfy the Due Process Clause. ATLA respectfully submits that none of the *Mathews* factors mandate heightened protection when a claim for punitive damages is asserted.

A. The Interest Affected.

Of crucial significance is the fact that the interest which would be affected by an erroneous decision is, constitutionally speaking, slight. In applying the *Mathews* analysis, this Court has dealt with a spectrum of private interests. Appropriately, the greatest weight is accorded to the loss of physical liberty. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). Property interests, particularly "mere loss of money," *Addington v. Texas*, 441 U.S. 418, 425 (1979), are far less substantial.

Another consideration which this Court has found highly relevant under the first *Mathews* factor is whether the proceeding "pits the State directly against" the party. *Santosky*, *supra*, at 760. A proceeding where the government "marshals an array of public resources to prove its case," may require heightened procedural protections. *Id.* at 761. But "the typical case involving a monetary dispute between private parties" lies at the "end of the spectrum." *Addington*, *supra*, at 423. This Court has pointed out that "while private parties may be interested

intensely in a civil dispute over money damages," society has "minimal concern with the outcome." *Santosky, supra*, at 756. See also *In re Winship*, 397 U.S. 358, 371 (1970)(Harlan concurring)(" In civil cases: we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.")

Pacific Mutual and amici expend considerable effort arguing that punitive damages, like criminal penalties, are intended to punish and deter misconduct. However, as noted earlier, even compensatory damages in tort actions have a punishment and deterrence function. More to the point, as *Mathews* and subsequent cases make clear, it is the importance of the private interest and direct opposition by the government, not the purpose of the deprivation, which determines what process is due.⁹

ATLA submits that the interest of a defendant facing a claim of punitive damages in a private civil action is constitutionally indistinguishable from the defendant's interest in preventing an erroneous compensatory award.

B. Risk of Erroneous Deprivation.

Pacific Mutual argues that under the common law, "arbitrary, selective punishment, at the whim of the particular jury or court, becomes the rule, giving free reign to bias and prejudice." Brief of Petitioner at 24. Nowhere is there any substantiation that a significant number of punitive verdicts are not merely large, but improper. Moreover, the common law already affords safeguards

⁹ The purpose served by a penalty is, of course, relevant to the determination of whether an action brought by the government is civil or criminal. In actions between private parties, there is no such ambiguity. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) is therefore inapposite. Cf. *United States v. Halper*, 109 S. Ct. 1892, 1902 (1989)(protection against double jeopardy inapplicable to actions by private parties seeking punitive damages).

against precisely this type of erroneous deprivation.

A feature of the common law of punitive damages is reliance upon judicial review to prevent excessive awards. See Restatement (Second) of Torts § 908 comment d (1979). Under the common law standard, a verdict may be overturned where it was "so excessive . . . as to demonstrate that the jury have acted against the rule of law, or have suffered their passions, their prejudices, or their perverse disregard for justice to mislead them." *Barry v. Edmunds*, 116 U.S. 550, 565 (1886). See generally L. Schlueter & K. Redden, *Punitive Damages* § 6.1B (2d ed. 1989). As one court states "judicial scrutiny over the awards provides a partial justification for allowing such awards in the first place. The specter of bankruptcy and excessive punishment can be in part dispelled to the extent that trial and appellate courts exercise their powers of review." *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979).

Indeed, defendants enjoy greater protection against large punitive awards than against large compensatory awards. For example, although many states permit a judge to order a new trial on the basis of inadequate compensatory damages, virtually all accept the view that additur does not apply to punitive damages. Courts may reduce, but not increase the jury's award. *Louisville & Nashville R.R. v. Street*, 164 Ala. 155, 51 So. 306 (1909); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980); see Note, 16 Cumberland L. Rev. 151, 158 (1985-86).

Another special protection is the well-settled rule that "Punitive damages should be painful enough to provide some retribution and deterrence, but should not be allowed to destroy the defendant." *Arab Termite & Pest Control v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982); *Olson v. Walker*, 781 P.2d 1015, 1021 (Ariz. App. 1989)(award "must not financially kill the defendant"); *Thiry v. Johns Manville Corp.*, 661 P.2d 515, 518 (Okla. 1985)(similar). Compensatory damages are not so limited.

The accusation that courts are unable or unwilling to

protect against excessive awards has no basis. One district judge recently remarked, "A large body of common law has developed and is developing through the reported case law and on computer research whereby meaningful standards of comparison are being created. Reviewing punitive damage awards under the special facts and circumstances of each case is really very little different than reviewing compensatory awards for intangible injuries." *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 691 F. Supp. 87, 100 (N.D. Ill. 1988), rev'd in part on other grounds, 877 F.2d 614 (7th Cir. 1989). If anything, "the court exercises much closer supervision over [punitive] awards than is the case with compensatory awards." *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 837 (Minn. 1988). *Accord*, *Home Insurance Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 203, 550 N.E.2d 930, 934 (1990); *Deal v. Byford*, 127 Ill. 2d 192, 203, 130 Ill. Dec. 200, 205, 537 N.E.2d 267, 272 (1989).

Commentators have noted a trend toward increased judicial scrutiny of punitive damage verdicts. *See* Ghiardi, *Punitive Damage Awards: An Expanded Judicial Role*, 72 *Marquette L. Rev.* 33, 43 (1988); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 *U. Chi. L. Rev.* 1, 44 (1982). And empirical studies indicate that courts frequently reduce or reverse punitive verdicts where appropriate. *See* M. Peterson, S. Sarma, M. Shanley, *Punitive Damages: Empirical Findings* viii (RAND Institute for Civil Justice 1987). A study of product liability verdicts found that courts reduce punitive damages to a greater extent than compensatory awards. U.S. General Accounting Office, *Product Liability: Verdicts and Case Resolution in Five States* 47 (Sept. 1989). Where juries err, the GAO concluded, "The tort system . . . appears to be correcting these errors." *Id.*

ATLA submits that existing procedures, including effective judicial review, sufficiently minimize the risk of erroneous deprivation "in the generality of cases." *Walters*

v. National Ass'n of Radiation Survivors, 473 U.S. 305, 322 (1985).

It is also immediately apparent that the proposed procedures would have little probable value in reducing the alleged harms. Pacific Mutual has chosen to argue that juries are not merely mistaken, but perverse. While proof beyond a reasonable doubt and unanimous verdicts might enhance the accuracy of jury factfinding, such procedures would be unavailing if it is true that juries ignore their oaths that instructions and make arbitrary decisions on the basis of bias and prejudice. An upper limit on damages would protect against large, but not necessarily excessive or arbitrary verdicts.

C. Government Cost

Fiscal and administrative burdens resulting from adoption of these procedures are not insubstantial. Requiring proof beyond a reasonable doubt, for example, would likely result in more frequent appeals and fewer post-trial settlements. The requirement of a unanimous jury might be expected to increase the number of hung juries.

In addition, this Court might reasonably anticipate a steady stream of petitions to determine whether state procedures, particularly "upper limits" on awards, satisfy due process. In addition, other defendants may be expected to seek due process protections in cases involving damage awards for pain and suffering, emotional distress, or other noneconomic damages.

IV. THE FREQUENCY, SIZE, AND ECONOMIC IMPACT OF PUNITIVE DAMAGE AWARDS DO NOT WARRANT EXPANSION OF DUE PROCESS IN FAVOR OF WRONGDOERS.

A. There is no "Explosion" in Punitive Damage Awards.

The tort reform amici complain that punitive damages

are "skyrocketing," with "explosive" growth in the size and number of awards. *See, e.g.,* Briefs of ATRA at 17, Business Roundtable at 4, Chamber of Commerce at 9, Equal Employment Advisory Council at 6. An increase in punitive damage awards, ATLA suggests, might well signify an increase in justice in our courts.¹⁰ However, with special emphasis on products liability cases, amici argue that the "explosion" in punitive damages proves that juries act upon bias against corporations or sympathy for individual plaintiffs. Additionally, the reformers argue that the increasing burden is eroding the ability of American business and industry to develop innovative products and compete in the world market. Recent empirical studies show that this "explosion" is little more than a myth.

The first was conducted by the Institute of Civil Justice at the Rand Corporation, which is funded primarily by business and insurance interests. Analysis of some 17,000 civil jury trials in Cook County and San Francisco County during 1960-84 led the researchers to conclude: "Punitive damages were rarely awarded in personal injury cases and there is little evidence that frequency has increased significantly. The study also found that most punitive damage awards remained fairly modest." M. Peterson, S. Sarma, M. Shanley, *Punitive Damages: Empirical Findings* (RAND Institute for Civil Justice 1987). Indeed, they found only six instances of punitive damages awards in product liability cases. The increase in punitive damages has occurred in cases involving business and contract torts, reflecting both the recent development of insurance bad faith law and the fact that "Many punitive

¹⁰ For example, states have accorded their citizens greater protection, particularly against insurance company bad faith, wrongful discharge, and business torts, making punitive damages available to victims who previously had no recourse.

Another explanation may be that there has been an increase in wrongful conduct, an explanation that is at least plausible given the deregulation of broad segments of the American economy.

damages now go to businesses suing other businesses for unfair practices." *Id.*¹¹

In the specific area of products liability, an empirical study indicated that punitive damages are so infrequent as to be of "relative insignificance." W. Landes and R. Posner, *The Economic Structure of Tort Law* 304-06 (1988). The U.S. General Accounting Office found that "Large punitive damage awards that were disproportionate to compensatory damages occurred in only a few cases," and were likely to be reduced by judicial review. GAO, *Product Liability: Verdicts and Case Resolution in Five States* 31 & 47 (Sept. 1989).

The most extensive analysis of punitive damage verdicts, covering 47 counties in 11 states, has been completed by Stephen Daniels and Joanne Martin for the American Bar Foundation. They found that:

Punitive damages were awarded infrequently, and when they were awarded the amount was typically modest. . . . Furthermore, plaintiffs were least likely to be awarded punitive damages in a case involving physical harm -- even if that case involved medical malpractice or products liability.

The punitive damage rates for physical harm cases,

¹¹ An American Bar Association study examined the Rand data and concluded that:

contrary to the common perception, punitive damages awards are neither routine nor routinely large, especially in personal injury cases including product liability and malpractice litigation. While punitive damages awards have grown in frequency and size over the past 25 years, the bulk of this growth has been in cases of intentional torts, unfair business practices or contractual bad faith. The punitive damages picture in personal injury cases has changed very little in 25 years. Moreover, while the size of punitive damages awards has increased, most are moderate in amount and the ratio of punitive to compensatory damages is generally not excessive.

Report of the Special Committee on Punitive Damages, *Punitive Damages: A Constructive Examination* 2-1 (ABA 1986).

including the high visibility areas of medical malpractice and products liability, were extremely low throughout the 19 years [1970-1988]. Furthermore, the typical punitive damage award remained modest.

S. Daniels and J. Martin, *Myth and Reality in Punitive Damages*, American Bar Foundation Working Paper 44 & 60 (1990), scheduled for publication at 75 Minn. L. Rev. (Oct. 1990).

— These findings dramatically refute the mythology urged upon this Court by the tort reformers. None of the researchers found an "explosion" in punitive damages. Indeed, the incidence and increase appears to be smallest in the areas of personal injury and products liability, where the purported jury bias should be most pronounced. Instead, the moderate growth in punitive damages is found in business and contract actions, reflecting expansions in substantive tort law rather than jury arbitrariness. Finally, the relative insignificance of punitive damages in products liability undermines the myth that such verdicts are eroding America's competitiveness.

B. Punitive Damages are Not Harming Innovation and Competitiveness

"There is surprisingly little evidence," states a highly significant study, "that liability currently hinders international competitiveness." P. Reuter, *The Economic Consequences of Expanded Corporate Liability* 37 (RAND 1988). One reason is that total product liability costs (of which punitive damages are a small fraction) add a relatively small amount to the price of the product -- less than 1% for the vast majority of companies, according to a broad survey of the risk managers of American manufacturers. Weber, *Product Liability: The Corporate Response* 13 (The Conference Board, 1987); Reuter at 45.

More importantly, American companies and their foreign competitors play on a level playing field. Honda,

which makes the largest selling car in the U.S., is subject to the same punitive damage rules applicable to American carmakers. See, e.g., *Dorsey v. Honda Motor Co.*, 673 F.2d 911 (5th Cir. 1982). Potential liability for punitive damages, does not appear to be discouraging foreign manufacturers from competing in the U.S. market. Conversely, American companies selling overseas are subject to the liability laws of the consumer's country. Reuter, *supra*, at 36-37. Studies by various industries themselves generally found no anticompetitive effect from U.S. liability laws. *Id.* at 38-40.

The claim that punitive damages harm innovation and development is also specious. The Pharmaceutical Manufacturers Association ["PMA"], which makes this argument in its amicus brief, points to the example of childhood vaccines, despite the fact that no maker of childhood vaccines has paid a cent in punitive damages.¹²

Punitive damages do not overdeter the development and marketing of beneficial products for the simple reason that they are not imposed for otherwise innocent conduct. They are merely additional damages assessed against one who willfully and wantonly or with conscious indifference engages in conduct which is already unlawful under the substantive law. The overdeterrence argument is properly directed to the state's product liability law itself.

The argument also fails to conform to reality. The fact is that American companies are spending vast sums to develop new medicines. "Companies Search For Next \$1 Billion Drug," New York Times, Nov. 28, 1988, at D1. PMA itself announced in a series of advertisements in the

¹²PMA misleadingly cites as "illustrative" the only jury verdict imposing punitive damages against a vaccine maker, *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986). PMA acknowledges that the verdict was overturned on appeal, but argues that the vote was 4-3, apparently finding a due process right not only against deprivation of property, but also against close calls. Brief of PMA at 17-18, n. 50. Similarly, the maker of Bendectin, PMA's other example, has not paid any punitive damages.

national media that research and development by U.S. pharmaceutical firms has "doubled every five years since 1970," and "Nearly half of the new medicines that achieved worldwide acceptance over a 12-year period originated in the United States." The series, "Innovations In Medicine," appeared in The Washington Post, Nov. 17, 1989.

At the very heart of the arguments of Pacific Mutual and the tort reform amici is a myth: The lawless jury. Two centuries of jurisprudence and extensive recent empirical research flatly contradict the reformers' dark and cynical portrait of our civil justice system. Nevertheless, they urge this Court to cast away guiding principles of due process, federalism, and the common law tradition. They offer a rule premised on distrust for judges and juries alike. The myth is wrong. Due process of law finds no higher expression than in the independent civil jury.

CONCLUSION

For these reasons, ATLA urges this Court to affirm the judgment of the Supreme Court of Alabama.

Respectfully submitted,

Jeffrey Robert White
1050 31st St., N.W.
Washington, DC 20007
Attorney for Amicus Curiae
Association of Trial Lawyers of America

July 16, 1990

JUL 16 1990

JOSEPH F. SPANIOL, JR.
CLERK

38

No. 89-1279

IN THE
Supreme Court Of The United States

October Term, 1989

PACIFIC MUTUAL LIFE
INSURANCE COMPANY,

Petitioner

vs.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN AND EDDIE HALGROVE,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

**BRIEF FOR AMICUS CURIAE
ALABAMA TRIAL LAWYERS ASSOCIATION
IN SUPPORT OF RESPONDENTS**

JOHN W. HALEY*

BRUCE J. MCKEE

Hare, Wynn, Newell & Newton
2026 2nd Ave. No., Suite 700
Birmingham, Alabama 35203
(205) 328-5330

*Attorneys for Amicus Curiae
Alabama Trial Lawyers Association*

**Counsel of Record*

TABLE OF CONTENTS

	<i>Page</i>
Table of Authorities	ii
Interest of Amicus Curiae	1
Summary of Argument	2
Argument	2
Judicial Review of Punitive Damage Verdicts in the State Courts of Alabama Provide Sufficient Due Process Safeguards	2
Conclusion	8

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Aetna Life Ins. Co. v. Lavoie</i> , 475 U.S. 813 (1986)	2
<i>Aetna Life Ins. Co. v. Lavoie</i> , 505 So.2d 1050 (Ala. 1987)	5, 8
<i>Bankers Life & Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988)	3
<i>Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.</i> , ___ U.S. ___, 109 S.Ct. 2909 (1989)	3
<i>Central Alabama Elec. Co-op v. Tapley</i> , 546 So.2d 371 (Ala. 1989)	5, 6
<i>Clardy v. Sanders</i> , ___ U.S. ___, 110 S.Ct. 376 (1989)	4
<i>Coryell v. Colbaugh</i> , 1 N.J. (Coxe) 77 (1791)	2
<i>General Motors Corp. v. Edwards</i> , 482 So.2d 1176 (Ala. 1985)	3
<i>Green Oil Co. v. Hornsby</i> , 539 So.2d 218 (Ala. 1989)	2, 4, 5, 7-8
<i>Hammond v. City of Gadsden</i> , 493 So.2d 1374 (Ala. 1986)	3, 7
<i>Hardy v. Hardy</i> , 507 So.2d 404 (Ala. 1986)	7
<i>Harmon v. Motors Ins. Corp.</i> , 493 So.2d 1370 (Ala. 1986), <i>on return from remand</i> , 525 So.2d 411 (Ala. 1987)	7
<i>Huckle v. Mone</i> , 2 Wils. K. B. 205, 95 Eng. Rep. 768 (C. P. 1763)	2
<i>Industrial Chemical & Fiberglass Corp. v. Chandler</i> , 547 So.2d 812 (Ala. 1989)	4, 7
<i>Land & Associates, Inc. v. Simmons</i> , Nos. 87-1313, 87-1320, 87-1331, and 87-1339, slip op. (Ala. Dec. 22, 1989)	8
<i>Louis Pizitz Dry Goods Co. v. Yeldell</i> , 274 U.S. 112 (1927)	4

TABLE OF AUTHORITIES — (Continued)

Cases:	Page(s)
<i>North Carolina Mut. Life Ins. Co. v. Holley</i> , 533 So.2d 497 (Ala. 1989)	8
<i>Pacific Mut. Life Ins. Co. v. Haslip</i> , 553 So.2d 537 (Ala. 1989)	4, 7
<i>Rhodes v. Roberts</i> , 1 Stew. 145 (Ala. 1827)	2
<i>Ridout's-Brown Service, Inc. v. Holloway</i> , 397 So.2d 125 (Ala. 1981)	2, 5
<i>State Farm Mut. Auto Ins. Co. v. Robbins</i> , 541 So.2d 477 (Ala. 1989)	7
<i>Tatum v. Schering Corp.</i> , 523 So.2d 1042 (Ala. 1988)	4
<i>United States Auto Ass'n v. Wade</i> , 544 So.2d 906 (Ala. 1989)	8
<i>Wilkes v. Wood</i> , 2 Wils. K. B. 205, 95 Eng. Rep. 768 (C. P. 1763)	2
<i>Williams v. Ralph Collins Ford-Chrysler, Inc.</i> , 551 So.2d 964 (Ala. 1989)	7
<i>Wilson v. Dukona Corp., N.V.</i> , 547 So.2d 70 (Ala. 1989)	5, 8
<i>Statutes:</i>	
Ala. Code § 6-11-20 (1975) (Supp. 1989)	6
Ala. Code § 6-11-23 (1975) (Supp. 1989)	6
<i>Other Authorities:</i>	
<i>Carr, Punitive Damages and Post-Verdict Procedures:</i>	
<i>Where Are We Now and Where Do We Go</i> <i>From Here?</i> , 51 Ala. Law. 90 (1990)	5-6
Comment, <i>Remittitur Practice in Alabama</i> , 34 Ala. L. Rev. 275 (1983)	3
Nettles and Latta, <i>Alabama's Wrongful Death Statute:</i> <i>A Problematic Existence</i> , 40 Ala. L. Rev. 475 (1989)	4
K. Redden, <i>Punitive Damages</i> (1980)	2

No. 89-1279

IN THE
Supreme Court Of The United States

October Term, 1989

PACIFIC MUTUAL LIFE
INSURANCE COMPANY,

Petitioner

vs.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN AND EDDIE HALGROVE,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

**BRIEF FOR AMICUS CURIAE
ALABAMA TRIAL LAWYERS ASSOCIATION
IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICUS CURIAE

The Alabama Trial Lawyers Association is composed of about 2000 lawyers who are dedicated to the ideals of preserving the adversarial system of justice and defending the rights of individuals. The Association believes in preserving the system of jury verdicts imposing punitive damages in appropriate cases as a socially desirable method of punishing wrongdoers and deterring others from engaging in similar wrongful conduct. The undersigned counsel of record is the Treasurer of the Association and the chair of its Amicus Curiae Committee.

SUMMARY OF ARGUMENT

Even if federal due process requires certain standards and procedures for the imposition of punitive damages in civil cases, the Alabama courts already meet or exceed any minimum due process standards. Caselaw and statutes enacted since 1986 require Alabama courts — trial and appellate — to stringently review verdicts alleged to be excessive. Therefore, the Petitioner in this case suffered no due process deprivation.

ARGUMENT

Judicial Review of Punitive Damage Verdicts in the State Courts of Alabama Provide Sufficient Due Process Safeguards

Virginia's Professor Kenneth R. Redden traces punitive damages — in civil cases — back to the English cases of *Wilkes v. Wood*, 2 Wils. K. B. 205, 95 Eng. Rep. 768 (C. P. 1763), and *Huckle v. Mone*, 2 Wils. K. B. 205, 95 Eng. Rep. 768 (C. P. 1763), and the first reported American case, *Coryell v. Colbaugh*, 1 N.J. (Coxe) 77 (1791). K. Redden, *Punitive Damages* 26, 32 (1980). The State of Alabama has sanctioned the use of punitive damages — then labeled “smart money” — since the case of *Rhodes v. Roberts*, 1 Stew. 145 (Ala. 1827). Traditionally, in Alabama, appellate opinions have repeated the principle that the amount of punitive damages was within the discretion of the jury. *Green Oil Co. v. Hornsby*, 539 So.2d 218, 222 (Ala. 1989). More recently, courts have begun to focus on the issue of “standards” governing the amount of punitive damage verdicts. Alabama's Justice Jones worried about “unguided discretion” and “no yardstick for measuring the amount of the award” in his special concurrence in *Ridout's-Brown Service, Inc. v. Holloway*, 397 So.2d 125, 127 (Ala. 1981).

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986), this Court remarked on the question of the “lack of sufficient standards governing punitive damage

awards in Alabama.” Similar comments appear in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989). Alabama courts have traditionally used language stating that new trial or remittitur would be proper only upon a showing that the verdict was the result of “bias, passion, prejudice, corruption, or other improper motive.” See, Comment, *Remittitur Practice in Alabama*, 34 Ala. L. Rev. 275, 278 (1983). The Law Review Comment cites scores of Alabama cases and argues the thesis that Alabama's remittitur practice lacked consistency. That thesis was cited, and virtually admitted, in *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1199-1200 (Ala. 1985).

However, whatever the defects may have been in Alabama's former punitive damages procedures, they are no longer existant. Almost immediately after this Court's decision in *Lavoie*, the Alabama Supreme Court began to fashion due process safeguards with the release of *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). Through the so-called “*Hammond* order” or “*Hammond* remand” procedures, the Alabama Supreme Court has now put into place sufficient objective standards by which both trial and appellate courts review claims of excessive punitive damages verdicts.

Under *Hammond*, Alabama trial judges must “state for the record the factors considered in either granting or denying a motion for new trial based upon the alleged excessiveness or inadequacy of a jury verdict.” 493 So.2d at 1379. Post-trial evidentiary hearings are allowed for this purpose. The original *Hammond* opinion suggested some relevant factors, such as: the culpability of defendant's conduct; the desirability of deterring others from similar conduct; and the impact upon the parties and others. *Id.*

A June, 1990, “Shepard's” search revealed 72 Alabama Supreme Court opinions citing *Hammond*. Of that number, 15 involve only compensatory damages. Another 12 are wrongful death cases. Alabama's unique wrongful death law provides solely damages denominated “puni-

tive." One Justice's view of the tortured history of Alabama's wrongful death statute is provided at *Tatum v. Schering Corp.*, 523 So.2d 1042, 1047 (Ala. 1988) (Houston, J., dissenting). This Court recently denied a petition for writ of certiorari (*Clardy v. Sanders*, 89-440, cert. denied on Nov. 6, 1989, 110 S.Ct. 376) attacking Alabama's wrongful death scheme on due process grounds. See generally, Nettles and Latta, *Alabama's Wrongful Death Statute: A Problematic Existence*, 40 Ala. L. Rev. 475 (1989). Furthermore, the "United States Supreme Court recognized the nonpenal effect of the [Alabama wrongful death] statute in its 1927 opinion . . ." *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So.2d 812, 818 (Ala. 1989) (citing *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927)).

The other 45 of the 72 "*Hammond*" cases involve some element of punitive damages, excluding wrongful death cases. Thirty-three are exclusively or partially fraud cases, such as *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala. 1989). The remainder involve conversion (5), bad faith (3), assault, trespass, defamation, and wantonness.

The most important post-*Hammond* case — particularly for the question of due process standards — is *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989). The following "nonexclusive" list of factors are to be considered by the trial court in its post-trial review of punitive damages verdict amount:

"[1] Punitive damages should bear a reasonable relation to the harm that is likely to occur from the defendant's conduct as well as the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

"[2] The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his con-

duct has caused or is likely to cause, and any concealment or cover-up of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of responsibility.

"[3] If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of this profit, so that the defendant recognizes a loss.

"[4] The financial position of the defendant would be relevant.

"[5] All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

"[6] If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

"[7] If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award."

Green Oil Co. v. Hornsby, 539 So.2d at 223-224 (quoting *Aetna Life Insurance Co. v. Lavoie*, 505 So.2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)).

Other factors mandated by the Alabama Supreme Court include "a comparative analysis with other awards in similar cases," *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050, 1053 (Ala. 1987); that "the defendant's right to fair punishment must be considered above the plaintiff's right to recover the fullest amount of punitive damages," *Wilson v. Dukona Corp., N.V.*, 547 So.2d 70, 73 (Ala. 1989); and that the punitive damages "ought to sting in order to deter," but normally should not "destroy," *Ridout's-Brown Service, Inc. v. Holloway*, 397 So.2d 125, 127 (Ala. 1981) (Jones, J., concurring), and *Central Alabama Elec. Co-op v. Tapley*, 546 So.2d 371, 377 (Ala. 1989). See Carr, *Punitive Damages and Post-Verdict Procedures: Where Are We Now and*

Where Do We Go From Here?, 51 Ala. Law. 90 (1990). Furthermore, one of Alabama's 1987 "tort reform" statutes, Ala. Code § 6-11-23 (1975) (Supp. 1989), mandates a de novo review of the nature, extent and economic impact of the verdict on the parties; the amount of compensatory damages; whether the defendant has committed similar wrongful acts; and the effort made by defendant to remedy the wrong. Also, Ala. Code § 6-11-20 (1975) (Supp. 1989) requires proof by "clear and convincing evidence."

"Due to the safeguards now in place in Alabama," the Alabama Supreme Court has rejected due process attacks on Alabama's system of awarding punitive damages. *Central Alabama Elec. Co-op v. Tapley*, 546 So.2d 371, 378 (1989). In explanation, the *Tapley* Court, 546 So.2d at 376-77, stated:

If a defendant is dissatisfied with a jury's verdict, and feels that it is excessive, or otherwise flawed, he is entitled to the protection of a variety of safeguards. The defendant may move for remittitur and a new trial in the trial court, and may appeal as a matter of right from the denial of either. He is entitled to a *de novo* review of the jury's verdict on appeal. The appellate courts in this state have the authority to order a new trial due to the excessiveness of the verdict, to conditionally order a new trial unless the plaintiff accepts a remittitur, and to order the trial court to conditionally order a new trial unless the plaintiff accepts a remittitur.

If a defendant properly moves the trial court to do so, the trial court is obligated to state on the record its reasons for either interfering with the jury's verdict or not interfering with it. And, in making the determination of whether the verdict is excessive (or inadequate), a trial court is authorized to consider the following non-exclusive list of factors: [the "*Green Oil*" factors].

The *Industrial Chemical* opinion, 47 So.2d at 839, rejected due process challenges and stated that, "In sum, 'fundamental fairness' requires that the defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the punitive award is unreasonably disproportionate, or economically destructive"

The Petitioner in this case had all the due process benefits of these standards and procedures. "In reviewing the punitive damages award in this case, the trial judge applied the principles of law adopted in these cases [*Hammond*, etc.], held a hearing, and set out on the record the reasons why he felt the law did not authorize him to order a remittitur. The facts in the record support the trial court's findings." *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537, 543 (Ala. 1989). There has been no due process violation in this case.

The Alabama courts do conscientiously and honestly apply these factors "with teeth." A case released the same day as *Hammond* demonstrates this assertion perfectly. In *Harmon v. Motors Ins. Corp.*, 493 So.2d 1370 (Ala. 1986), the jury awarded \$500,000 for fraud. The trial court remitted \$460,000 of the verdict, and, after a "*Hammond* remand," the Alabama Supreme Court affirmed the remittitur. *Harmon v. Motors Ins. Corp.*, 525 So.2d 411 (Ala. 1987). In *Williams v. Ralph Collins Ford-Chrysler, Inc.*, 551 So.2d 964 (Ala. 1989), a verdict for \$25,000, based on fraud and other claims, was remitted to \$10,000 by the trial court. The appellate court affirmed, referring to the "*Hammond* order" that found that the claimant's crying on the witness stand resulted in too much sympathy by the jury. In *State Farm Mut. Auto. Ins. Co. v. Robbins*, 541 So.2d 477 (Ala. 1989), a \$5,000,000 fraud verdict was remitted to \$500,000 and affirmed. *Hardy v. Hardy*, 507 So.2d 404 (Ala. 1986), a stockholder derivative suit for conversion or waste of corporate property, affirmed a remittitur from \$140,000 to \$100,000. *Green Oil Co. v. Hornsby*,

539 So.2d 218 (Ala. 1989), a fraud and breach of contract case, affirmed the remittitur of all but \$25,000 of a \$150,000 punitive damages verdict. Lastly, and most recently, the Alabama Supreme Court affirmed a fraud remittitur from \$2,500,000 down to \$600,000 in *Land & Associates, Inc. v. Simmons*, Nos. 87-1313, 87-1320, 87-1331, and 87-1339, slip op. (Ala. Dec. 22, 1989).

Ala. Code § 12-22-71 (1975) grants to appellate courts in Alabama the authority to order remittitur at the appellate level. The Alabama Supreme Court has used this authority often in order to control excessive verdicts. For example, even in face of the trial court's "Hammond order" refusing to remit, *North Carolina Mut. Life Ins. Co. v. Holley*, 533 So.2d 497, 507 (Ala. 1989), ordered a fraud verdict reduced from \$1,000,000 to \$500,000. In *United States Auto. Ass'n v. Wade*, 544 So.2d 906 (Ala. 1989), the \$3,500,000 punitive non-jury judgment for bad faith was remitted to \$2,500,000. In *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987), a \$3,500,000 bad faith verdict was remitted by the Alabama Supreme Court to \$500,000. And, in *Wilson v. Dukona Corp., N.V.*, 547 So.2d 70, 74 (Ala. 1989), all of the punitive damages portion of the verdict was remitted by the Supreme Court because the relative poverty of the defendants indicated that punitive damages "would do nothing to further society's goals of punishment and deterrence."

CONCLUSION

The cases cited herein demonstrate that — even if this Court rules that federal due process requires certain objective standards and procedures in civil cases seeking punitive damages — Alabama already has in effect in its courts adequate due process safeguards, and that this Petitioner did not suffer a denial of due process.

Respectfully submitted,

JOHN W. HALEY*
 BRUCE J. MCKEE
 Hare, Wynn, Newell & Newton
 2026 2nd Ave. No., Suite 700
 Birmingham, Alabama 35203
 (205) 328-5330

*Attorneys for Amicus Curiae
 Alabama Trial Lawyers Association
 in Support of Respondents*

**Counsel of Record*